

THE YALE JOURNAL OF WORLD PUBLIC ORDER

Volume 7, Number 2, Spring 1981

Claims Against International Organizations: *Quis custodiet ipsos custodes**

Mahnoush H. Arsanjani[†]

Introduction

It is a general principle of law, whatever the community, that a legal entity is responsible for the proximate injuries its acts may cause. The principle is fundamental in the regulation of private entities, and jurisprudence exhibits a clear trend toward the increasing subjection of governments to this same rule of law.¹ In international law, the principle has long been expressed and applied in the doctrine of "State responsibility." There appears to be no cogent reason for suspending the operation of this policy with regard to acts of international organizations (IOs).²

The very organization and *raison d'être* of such entities would seem to require its plenary application. Clyde Eagleton believed that the historical "rules" of the international law of responsibility apply, perhaps with some variations, to any subject of international law.³ As of 1950, however, he observed that the Charter gave the United Nations little authority under which it could cause harm to others.⁴ The Organization had no army, navy, or military instruments through which to im-

* The author gratefully acknowledges the invaluable comments and criticism of Myres S. McDougal and W. Michael Reisman. Eisuke Suzuki read the manuscript and made helpful comments.

The views here expressed are her own and are not necessarily representative of those who have helped her or of the United Nations.

† Legal Officer, Codification Division, Office of Legal Affairs, United Nations.

1. U.S. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 (1976); State Immunity Act, 1978, ch. 33; European Convention on State Immunity, *done* May 16, 1972, Europ. T.S. No. 74 (1972).

2. This Article deals only with international organizations whose members are States, with emphasis on the United Nations.

3. Eagleton, *International Organization and the Law of Responsibility*, 76 HAGUE RECUEIL 323, 325 (1950).

4. *Id.* at 386.

pose its wishes and little trade activity, territory, or population to protect. Hence he predicted that, at most, the Organization would infrequently undertake activities causing injuries.

While Eagleton's presumption of IO's responsibility proved correct, his prediction that they would cause little injury was wrong, perhaps because he compared IOs with States and looked for similar sources of responsibility. Some IO activities may resemble those of States, but in most cases the sources of responsibility of IOs are different. Francisco V. García-Amador, the first Special Rapporteur to the International Law Commission (I.L.C.) on the subject of international responsibility, had a much broader and more realistic concept of responsibility. From observing the increased activities of IOs, he believed that non-performance of obligations by such organization is like the breach or non-observance of any other international obligations and necessarily involves responsibility.⁵

This Article contends that IOs, as both creations and creators of international law, cannot ignore the principles that created them and that they are designed to promote. IOs must be deemed incapable of excluding themselves arbitrarily from international obligations. Their exercise of power must conform to international law. It would be illogical to assume that member States intended to create international organizations with competence to transgress the obligations the States themselves were assuming.⁶

The responsibility of IOs derives from community expectation about their personality as subjects of international law, designed for specific objectives, and provided with only such authority, resources, and bases of power as are necessary to such objectives. Therefore, where IO activities in breach of international law result in injury, IOs are responsible for the injury like other subjects of international law. Any action by IOs in contravention of the basic principles of responsibility can be expected to draw complaints from States and others concerned with the

5. State Responsibility, 8 U.N. GAOR, U.N. Doc. A/CN.4/96 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 173, 189-90, U.N. Doc. A/CN.4/SER.A/1956/Add. 1 (report prepared by García-Amador).

6. According to Professors McDougal, Lasswell, and Chen, [t]he struggle to bring kings and presidents and other agencies within the confines of the fundamental laws of national communities has left too indelible an impression upon too many people to make plausible any supposition that the founders of the United Nations intended to create, or have created, an organization free of its own basic principles.

M. McDUGAL, H. LASSWELL, & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 332 (1980). The principles of the U.N. Charter and the obligations set out in its instruments may be interpreted as applying to the organization itself and to its organs. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 677 (2d ed. 1973).

common interest. In determining responsibility, one must not, of course, overlook the principal purposes and effective functioning of IOs.

By the principle of implied assumption of obligations,⁷ the United Nations and its affiliated organizations have been held subject to an obligation to observe the purposes embodied in the United Nations Charter. Article 1 of the Charter⁸ defines those purposes as including "promotion and encouraging respect for human rights and for fundamental freedoms for all." The United Nations is "to be a centre for harmonizing the actions of the nations in the attainment of these common ends." Article 1 also emphasizes "conformity with the principles of justice and international law," and Article 2⁹ refers to the principle of "good faith." One criterion for testing the genuineness and effectiveness of these principles is whether they are observed by IOs. It would be fantastic to assume that United Nations officials and agencies are authorized to violate the principles they were established to serve.

IOs themselves have recognized some responsibilities. Despite the extraordinary expansion of international organization activity in the past three decades, however, the responsibility of these organizations for injurious violation of generally accepted obligations has yet to be codified or systematically appraised. IOs now operate in regional as well as global arenas. They do more things in more places than was anticipated when they were created. They undertake political, social, economic, environmental, and military operations. In many cases, their legal personalities have been modified and, by option or need, they occasionally operate on legal bases quite different from those originally conferred on them.

The International Court of Justice (I.C.J.) recognized early the potential for development of IOs when it defined the legal personality of the United Nations in the *Reparations Case*. Noting that the requirements of international life had created entities different from States, the Court stated that the rights and duties of the United Nations must depend on its "purposes and functions as specified or implied in its constituent documents and *developed in practice*."¹⁰

7. See *Reparations Case*, [1949] I.C.J. 174.

8. U.N. CHARTER art. 1.

9. U.N. CHARTER art. 2.

10. [1949] I.C.J. at 185. For further analysis of the international personality of IOs, see H. KELSEN, *THE LAW OF THE UNITED NATIONS* 329-30 (1950); L. OPPENHEIM, *INTERNATIONAL LAW* 381-84, 420-22 (8th ed. Lauterpacht 1967); G. WEISSBERG, *THE INTERNATIONAL STATUS OF THE UNITED NATIONS* 12-13, 23 (1961); Eagleton, *supra* note 3; Hahn, *EURATOM: The Conception of an International Personality*, 71 HARV. L. REV. 1001, 1045-

The changing authority and activities of IOs may pose difficult questions of responsibility because they increase the possibility of injury or grievance. As members of the international community, IOs have both rights and obligations. In the *Reparations Case*, the I.C.J. emphasized that the United Nations is a subject of international law capable of "possessing international rights and duties."¹¹ Because IOs are created to promote public order, it would be perverse, even destructive, to postulate a community expectation that IOs need not conform to the principles of public order. This Article examines the scope of the claims against IOs and analyzes expectations in the present international order about the responsibility of these organizations. Though this Article primarily focuses on the United Nations, a comparable theory and analysis apply to other IOs.

Once it is determined that IOs have some measure of responsibility, it becomes necessary to inquire into the degree of that responsibility. The doctrine of "State responsibility" seeks to balance the interests of the larger community in the secure and economic maintenance of a global society and economy with the adequate protection by each State of its own internal social processes. In the context of IOs, the corresponding task calls for accommodating the larger community's interest

46 (1958); Penfield, *The Legal Status of the Pan American Union*, 20 AM. J. INT'L L. 257 (1926); Sloan, *Reparation for Injury to Agents of the United Nations*, 28 NEB. L. REV. 401 (1949); Williams, *The Legal Character of the Bank for International Settlements*, 24 AM. J. INT'L L. 665 (1930).

See also D. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* (3rd ed. 1975); F. SEYERSTED, *OBJECTIVE INTERNATIONAL PERSONALITY OF INTERGOVERNMENTAL ORGANIZATIONS* (1963); Jenks, *The Legal Personality of International Organizations*, 22 BRIT. Y.B. INT'L L. 267 (1945); Yuen-Li Liang, *The Legal Status of the United Nations in the United States*, 2 INT'L L.Q. 577 (1948-49); Seidl-Hohenveldern, *The Legal Personality of International and Supranational Organizations*, 21 REVUE EGYPTIENNE DE DROIT INTERNATIONAL 35 (1965).

Sometimes later bilateral or multilateral agreements have recognized or modified the legal personality of IOs. *E.g.*, Interim Agreement on Privileges and Immunities of the United Nations, June 11, 1946, United Nations-Switzerland, 1 U.N.T.S. 163; Agreement on Legal Status of the World Health Organization, July 17, 1948, World Health Organization-Switzerland, 26 U.N.T.S. 331; Agreement on Legal Status of the World Meteorological Organization, Mar. 10, 1955, World Meteorological Organization-Switzerland, 211 U.N.T.S. 277; Agreement on Legal Status, June 11, 1955, European Organization for Nuclear Research-Switzerland, 249 U.N.T.S. 405.

The title of the Interim Agreement on the Privileges and Immunities of the United Nations was amended by an additional agreement between the Secretary-General of the United Nations and the Swiss Federal Council, so that the title has become "Agreement on the Privileges and Immunities of the United Nations." [1963] U.N. JURIDICAL Y.B. 43.

The agreement establishing the African Development Bank provides that "the Bank shall possess full international personality" and "may enter into agreements with members, non-member States and other international organizations." Agreement Establishing the African Development Bank, Aug. 4, 1963, art. 50, 510 U.N.T.S. 3, 100.

11. [1949] I.C.J. at 178-79.

in the effective and economic functioning of IOs for the purposes for which they were created with the interests of victims of IO activities. Of course, the policies at stake will differ with the injured parties and the types of injury.

I. Potential Claimants

IO operations require contact at many levels with diverse parties who may be injured by IO activities. Parties may include dependent peoples, governments, other IOs, individuals, and employees.

A. *Dependent Peoples*

This category of claimants is particularly relevant to the U.N., for the U.N. may acquire direct or indirect supervision over dependent peoples. For example, the United Nations Temporary Executive Authority (U.N.T.E.A.) administered the territory of West New Guinea (West Irian) from August 15, 1962 until May 1, 1963, when the U.N. transferred "full administration responsibility" to Indonesia.¹² After the U.N. terminated the Mandate of South Africa over South West Africa (Namibia),¹³ it established the Council for Namibia in 1967 as the administering authority of Namibia.¹⁴ Since then the Council has been acting on behalf of the people of Namibia, primarily representing them in international meetings and concluding bilateral agreements with certain countries concerning identification papers for Namibians.¹⁵ Yet the exact authority of the Council for Namibia is unclear. If the activities of the Council cause injuries to the future State of Namibia, other States, or non-State entities, the Council might become a defendant in a proceeding to recover damages resulting from its alleged unlawful acts.

B. *Governments*

IOs undertake activities within the territorial jurisdiction of States. In addition to convening conferences and establishing headquarters and premises, IOs may assist governments in health and development

12. See Agreement Concerning West New Guinea (West Irian), Aug. 15, 1962, Indonesia-Netherlands, 437 U.N.T.S. 273. The General Assembly took note of the agreement and authorized the Secretary-General to carry out the tasks therein entrusted to him. G.A. Res. 1752, 17 U.N. GAOR, Supp. (No. 17) 70, U.N. Doc. A/5217 (1962).

13. G.A. Res. 2145, 21 U.N. GAOR, Supp. (No. 16) 2, U.N. Doc. A/6316 (1966).

14. G.A. Res. 2248 (S-V), Fifth Special Session, Supp. (No. 1), U.N. Doc. A/L.516/Rev.1 (1967). See Herman, *The Legal Status of Namibia and the United Nations Council for Namibia*, 13 CAN. Y.B. INT'L L. 306 (1975).

15. [1967] U.N. JURIDICAL Y.B. 309.

programs, help refugees, lend money (in the case of regional or international banks), and undertake military activities (as peace observers or peace-keeping forces). These activities sometimes cause injuries to governments because of alleged wrongdoing attributable to IOs.

Some IOs may also become parties to international conventions. In such circumstances, States may bring claims against IOs for violation of those conventions. For example, in the 1978 Geneva session of the Law of the Sea Conference, a proposal was put forward for the European Economic Community (E.E.C.) to become party to the future Convention of the Law of the Sea as a legal entity separate from its members.¹⁶

C. *Private Parties*

By private parties, we refer to individuals and private corporate entities that are not IO employees. Though, historically, it was assumed that the work of IOs was related to interstate affairs, individuals and private entities increasingly seem to be affected by IO operations. IOs buy, sell, and lease movable and immovable property; acquire copyrights and patents; grant and obtain loans; engage firms and individual contractors to perform services; conclude contracts for insurance and public utility services; receive donations, and the like.¹⁷

D. *Employees*

IOs generally have staff numbering hundreds or thousands of employees. Numerically, this group may be the largest category of claimants. Their claims may include administrative matters (*e.g.*, promotion, contractual obligations, acquired rights, and pension benefits) as well as torts.

II. Types of Claims

The types of claims that may be made against IOs are almost as varied as the category of potential claimants. Though presently most claims against IOs are for breach of contract or for torts, there is potential for claims regarding non-performance of international treaty obligations, *ultra vires* acts, or labor relations.

16. U.N. Press Release SEA/310 (May 16, 1978). The proposal is still under negotiation. See U.N. Doc. A/CONF.62/L.86 (1982).

17. *E.g.*, The European Atomic Energy Community (EURATOM) had about 190 research contracts and about 200 purchase and construction contracts in 1967. Seyersted, *Applicable Law in Relations between Intergovernmental Organizations and Private Parties*, 122 HAGUE RECUEIL 433, 462 (1967).

A. *Contracts*

IOs undertake contractual obligations for construction, transportation, research studies, lease and purchase of movable and immovable property, etc. There seems to be almost no difference in the processes of commitment, performance, and change between contracts made by IOs with private parties and those made by private parties or by private parties with States. The only difference is procedural: IOs often enjoy extensive immunities from national jurisdiction. This difference does not go to substantive responsibility. Indeed law and practice in relation to contracts made by IOs appears more settled than that in relation to agreements made by States. The majority of IOs seem satisfied with the present situation.¹⁸

One difference between IO contracts and those of private parties relates to contracts for the sites of IOs.¹⁹ In most cases, those contracts are between the organization concerned and the host government. Site contracts are not related to the principal objectives of IOs, but they are indispensable to the establishment and physical set-up of the organizations. Hence, these contracts give some special treatment to IOs. Though there have been no disputes, it is expected that decision-makers would consider the special status of IOs and, as a matter of policy, would avoid disrupting the international functions of IOs.

Contracts between IOs enjoying extensive immunities and private parties generally contain clauses referring to the immunities. Such clauses obviously have no counterpart in similar contracts between private parties. In U.N. contracts, for example, there are two separate clauses regarding U.N. immunities and the non-liability of its Members. They emphasize U.N. immunity from the jurisdiction of local courts and seek to protect U.N. civil servants from liability arising from the contracts.²⁰ Where private contractors undertake technical opera-

18. See [1976] U.N. JURIDICAL Y.B. 159, 176. See also Valticos, *Les contrats conclus par les organisations internationales avec des personnes privées*, 57 (I) ANNUAIRE, INSTITUT DE DROIT INTERNATIONAL 1 (1977); *Cinquième séance plénière*, 57 (II) ANNUAIRE, INSTITUT DE DROIT INTERNATIONAL 264-78 (1977).

19. Agreement on Ariana Site, June 11, 1946, United Nations-Switzerland, 1 U.N.T.S. 153. For the New York laws pertaining to the site of the United Nations Headquarters, consult N.Y. UNCONSOL. LAWS §§ 9608-9610 (McKinney 1974). See also Bota, *The Capacity of International Organizations to Conclude Headquarters Agreements, and some Features of these Agreements*, in AGREEMENTS OF INTERNATIONAL ORGANIZATIONS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES (K. Zemanek ed. 1971).

20. For example, an unpublished agreement (on file with the U.N. Legal Department) between the United Nations and a private contractor for construction of the headquarters of the Economic and Social Commission for Asia (E.S.C.A.P.) in Thailand provides:

Nothing contained in the Contract shall be deemed a waiver, express or implied, of any privilege or immunity which the United Nations may enjoy according to law,

tions on behalf of IOs such as the World Health Organization (W.H.O.), the service contracts typically grant immunity to the private contractors. Disputes are to be settled with the IOs themselves, either as provided in the contracts, as agreed between the parties, or according to precedent.

IOs may also make commitments to individuals as part of their principal functions. The main objective of regional development banks, for example, is social and economic development of member countries.²¹ One function of regional banks is to make loans to member States or their citizens for development projects.²² Where loan contracts lead to disputes with private parties,²³ such disputes would arise from contracts related to the principal objectives of the banks.

B. *Torts*

Claims regarding damages caused by torts attributable to IOs are numerous. The concept of IO tort responsibility has been recognized by the organizations, by judicial decisions, and by past practice. In rela-

whether pursuant to the Convention on Privileges and Immunities of the United Nations as adopted by the General Assembly of the United Nations on 13 February 1946, or to any regulation of the United Nations and any other resolution, order or decree of any of the organs of the United Nations or to the Agreement between the United Nations and the Government of Thailand Relating to the Head-Quarters of the Economic Commission for Asia and the Far East in Thailand on 26 May 1954 or any other law, order or decree of the Government of Thailand or of any other country or otherwise, existing at the present time or hereafter brought into force.

Neither the Members of the United Nations nor any officer, agent or employee thereof shall be charged personally by the Contractor for any liability, or held liable to him under any term or provision of the Contract, or because of its execution or because of any breach thereof.

In addition to the United Nations, the Organization of American States (O.A.S.) and other IOs have been subject to private claims. *See, e.g.*, *Dupree Assoc. v. O.A.S.*, No. 76-2335 (D.D.C., June 1 and June 22, 1977) (memorandum orders); *Broadbent v. O.A.S.*, 628 F.2d 27 (D.C. Cir. 1980).

21. The objectives are either stipulated in the constitutions of the regional development banks or are enunciated by their officials. *See, e.g.*, F. HERRERA, *THE INTER-AMERICAN BANK* 31-34 (1962) (views of Felipe Herrera, President of the Inter-American Development Bank).

22. *See, e.g.*, Agreement Establishing the Inter-American Development Bank, *opened for signature* Apr. 8, 1959, art. I, § 2, 10 U.S.T. 3029, T.I.A.S. No. 4397, 389 U.N.T.S. 69.

23. For an examination of the legal questions concerning loan agreements, see G. DELAUME, *ASPECTS OF INTERNATIONAL LENDING AND ECONOMIC DEVELOPMENT FINANCING* 79 (1967); Delaume, *The Proper Law of Loans Concluded by International Persons: A Restatement and a Forecast*, 56 AM. J. INT'L L. 63 (1962); J. SALMON, *LE RÔLE DES ORGANISATIONS INTERNATIONALES EN MATIÈRE DE PRÊTS ET D'EMPRUNTS* 223-37 (1958); Salmon, *Les contrats de la BIRD*, 2 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 635 (1956); Broches, *International Legal Aspects of the Operations of the World Bank*, 98 HAGUE RECUEIL 301 (1959); Seyersted, *supra* note 17, at 504-20; Sereni, *International Economic Institutions and the Municipal Law of States*, 96 HAGUE RECUEIL 133 (1959); Cutler, *The Inter-American Development Bank*, 16 BUS. LAW. 22 (1960).

tion to contracts made by IOs, particularly those with extensive immunities, some judicial method of dispute settlement is commonly provided. The mere availability to the claimant of a judicial process makes some difference in the atmosphere of settling the claim and may be an incentive to settle by negotiation.

Tort liability generally arises unexpectedly. IO activities leading to tort claims may occur during the normal course of operations or during crisis situations. Except where an IO enters into a long-term operation in which torts can be anticipated, no methods of dispute settlement generally exist. The absence of established and assured judicial fora distinguishes torts attributable to IOs from those attributable to private parties.

1. *In Ordinary Operations*

One cannot predict when a tort will occur, but one can predict that certain activities are likely to give rise to torts. The constituent instruments of some IOs recognize tort responsibility.²⁴ When IOs undertake special operations in the territory of States, responsibility for liability deriving from those operations is generally determined by special agreements between IOs and host countries. In principle, IOs are responsible for damages caused by their illegal acts.²⁵ There are excep-

24. The treaties establishing the European Atomic Energy Community and the E.E.C. provide that "[a]s regards non-contractual liability, the Community shall, in accordance with the general principles common to the laws of Member States, make reparation for any damage caused by its institutions or by its employees in the performance of their duties." Treaty Establishing the European Atomic Energy Community (EURATOM), done Mar. 25, 1957, art. 188, 298 U.N.T.S. 169; Treaty Establishing the European Economic Community (E.E.C.), Mar. 25, 1957, art. 215, 298 U.N.T.S. 11 [hereinafter cited as Treaty of Rome].

A year after the establishment of the U.N., the General Assembly recognized the frequency of motor accidents and the responsibility of the U.N.:

It is the intention of the United Nations to prevent the occurrence of any abuse in connection with privileges, immunities and facilities granted to it under Articles 104 and 105 of the Charter and the General Convention on Privileges and Immunities, which determines the details of the application of these Articles.

Therefore the General Assembly instructs the Secretary-General to ensure that the drivers of all official motor cars of the United Nations and all members of the staff, who own or drive motor cars, shall be properly insured against third party risks.

G.A. Res. XIII 6(E), 1 U.N. GAOR, pt. 1, at 644 (1946).

Following this policy statement, motor vehicles owned by the U.N. have been insured against third-party liability. See also C. CROSWELL, PROTECTION OF INTERNATIONAL PERSONNEL ABROAD 24-25, 55-57 (1952). Carrying such third-party liability, however, does not mean that the U.N. has waived immunities. The U.N. does not generally have insurance against third-party liability. See [1975] U.N. JURIDICAL Y.B. 160-61. The waiver of immunity will depend on the organization's decision in every case.

25. Eagleton, *supra* note 3, at 319; García-Amador, *La responsabilité internationale de l'Etat: La responsabilité des organisations internationales*, 34 REVUE DE DROIT INTERNATIONAL, DE SCIENCES DIPLOMATIQUES ET POLITIQUES 149 (1956); Visscher, *Observation sur le fondement et la mise en oeuvre du principe de la responsabilité de l'Organisation des Nations*

tions. In some instances, States in whose territory operations are conducted will be responsible for claims lodged against the IOs.²⁶ IOs may assume responsibility, however, for gross negligence or willful misconduct.²⁷ With respect to third party injury, IOs may disclaim responsibility for the recommendations and reports prepared by their experts, unless the IOs revise and adopt the recommendations and reports as their own.²⁸

2. *In armed conflicts*

Until now, relatively few IOs have been involved in armed conflicts. The U.N. has been involved in conflicts in Greece (1947), Kashmir (1948), Palestine (1948), Lebanon (1958), West New Guinea (1962-63), Yemen (1963-64), Suez (1956-57), the Congo (1960-64), Cyprus (since

Unies, 40 REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARÉ 165 (1963); Ritter, *La protection diplomatique à l'égard d'une organisation internationale*, 8 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 427, 441 (1962); Salmon, *Les accords Spaak-U Thant du 20 février 1965*, 11 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 468, 477 (1965).

26. For example, Article I(6) of the Agreement of May 21, 1968 between Australia, on the one hand, and the U.N., the World Health Organization (W.H.O.), the International Labour Organization (I.L.O.), the Food and Agricultural Organization (F.A.O.), UNESCO, the International Civil Aviation Organization (I.C.A.O.), the International Telecommunications Union (I.T.U.), the World Meteorological Organization (W.M.O.), the International Atomic Energy Agency (I.A.E.A.), the Universal Postal Union (U.P.U.), the Intergovernmental Maritime Consultative Organization (I.M.C.O.), and the United Nations Industrial Development Organization (U.N.I.D.O.), on the other, provides for technical assistance to the Territory of Papua and the Trust Territory of New Guinea.

The Government shall be responsible for dealing with any claims resulting from operations in the Territories under this Agreement which may be brought by third parties against the Organizations jointly or separately and their experts, agents and employees and shall hold harmless the Organizations and their experts, agents and employees in case of any claims or liabilities resulting from such operations, except where it is agreed by the Government and the Administrator of the United Nations Development Programme and the Organization concerned that such claims or liabilities arise from the gross negligence or wilful misconduct of such experts, agents or employees.

[1968] U.N. JURIDICAL Y.B. 44. Article VI, para. 1 of UNICEF's Model Agreement provides: "The Government [in whose territory a plan is executed] shall assume, subject to the provisions of this Article, responsibility in respect of claims resulting from the execution of Plan of Operations within the territory. . . ." UNICEF Field Manual, vol. II, pt. IV-2, Appendix A (Aug. 16, 1961). A similar provision is found in the Technical Assistance Board/Special Fund Field Manual, Section D1/1, a(i) (Feb., 1963).

27. Article VIII, para. (f) of the Model Agreement concerning assistance for the Special Fund disclaims responsibility, except where "it is agreed by the Parties hereto, and the Executive Agency, that such claims or liabilities arise from the gross negligence or willful misconduct of such persons." Technical Assistance Board/Special Fund Field Manual, section D1/1 a(ii) (Feb., 1963).

28. Disclaimers may appear in U.N. publications relevant to policy analysis, as well as technical matters, prepared by outside consultants. See, e.g., An International Law Analysis of the Major United Nations Resolutions Concerning the Palestinian Question, U.N. Doc. ST/SG/SER.F/4 (1979) (paper prepared by two outside consultants). A note at the front of the document reads: "This study was prepared and published at the request of the Committee on the Exercise of the Inalienable Rights of the Palestinian People. The views expressed are those of the authors."

1964), and Lebanon (since 1978). Two other IOs also have participated in armed conflicts. The Organization of American States (O.A.S.) introduced an "Inter-American Armed Forces" into the Dominican Republic in 1965; its competence to create such forces has been the subject of controversy.²⁹ There seems to be no record of claims against the O.A.S. arising from this operation. The League of Arab States interposed disengagement forces in Kuwait (1961), in Yemen (1962), in the North and South Yemen conflict (1972), and in Lebanon (since 1978).³⁰ In Kuwait's case, there was a U.N.-type status of forces agreement that provided procedures for dispute settlement.³¹ There seems to be no record of claims against the League for its operations.

Because of the unavailability of information, only U.N. peace-keeping operations can be examined. These operations³² were mounted with little or no prediction of their eventual scope and the liability arising from them. The inherent unpredictability of such operations should not and has not minimized IO responsibility for unjustifiable injury to States and individuals.

Though framed in general and vague provisions, some responsibilities have been recognized in bilateral agreements between the U.N. and States. For example, the agreement relating to the legal status, facilities, privileges, and immunities of the United Nations Operations in the Congo (O.N.U.C.) provided for U.N. settlement of disputes involving loss or damage to citizens or residents of the Congo caused by the U.N. Force or by U.N. officials.³³ Three years later, the 1964 agreement with

29. See Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3, Additional Protocol, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, 721 U.N.T.S. 324; Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No. 1838, 21 U.N.T.S. 77; L. SOHN, CASES ON UNITED NATIONS LAW 1025-72 (2d ed. 1967); Connell-Smith, *The O.A.S. and the Dominican Crisis*, 21 THE WORLD TODAY 229 (1965); Fenwick, *The Dominican Republic: Intervention or Collective Self-Defense*, 60 AM. J. INT'L L. 64 (1966).

For a discussion of *ad hoc* international forces, see D. BOWETT, UNITED NATIONS FORCES 5-11 (1964).

30. Pact of League of Arab States, Mar. 22, 1945, art. 6, 70 U.N.T.S. 238. For a brief study of the Arab League military operations, see H. HASSOUNA, THE LEAGUE OF ARAB STATES AND REGIONAL DISPUTES 379-82 (1975).

31. H. HASSOUNA, *supra* note 30, at 447.

32. For an analysis of the concept of peace-keeping and a review of U.N. policies, see D. WAINHOUSE, INTERNATIONAL PEACE-KEEPING AT THE CROSSROADS 1-10 (1973); Auma-Osolo, *U.N. Peace-keeping Policy*, 6 CAL. W. INT'L L. J. 323-59 (1976); Auma-Osolo, *Retrospective Analysis of U.N. Activity in Congo and its Significance for Contemporary Africa*, 8 VAND. J. TRANSNAT'L L. 451-74 (1975); Dai, *Canada and the Review of U.N. Peace-keeping Operations*, 12 CAN. Y.B. INT'L L. 186-210 (1974).

33. Under the terms of the agreement,

[i]f as a result of any act performed by a member of the Force or an official in the course of his official duties, it is alleged that loss or damage that may give rise to civil proceedings has been caused to a citizen or resident of the Congo, the United Nations shall settle the dispute by negotiation or any other method agreed between the Parties; if it is

Cyprus regarding the U.N. peace-keeping forces in Cyprus stipulated that claims by Cypriot citizens or by the Cypriot government against the U.N. Force, and claims by the Force or the government against each other, would be settled by a claims commission.³⁴ An identical provision appears in the 1957 agreement between the U.N. and Egypt regarding the U.N. Emergency Force in that country.³⁵ The U.N. agreement with Lebanon concerning the U.N. Emergency Force there³⁶ is phrased slightly differently. Its effects are unclear. It provides that "civil claims or disputes involving a member of the Force acting in the course of his official duty shall be settled in accordance with the provisions of Article VIII of the Convention on the Privileges and Immunities of the United Nations." Yet Article VIII only says that the U.N. should provide some procedure for dispute settlement, with no reference to specific methods. Though other peace-keeping operations have not provided for resolution of claims, it is possible to infer from these four agreements a general policy for determining liability for U.N. operations.

Peace-keeping operations are complex not only in terms of the politics involved, but also in terms of the legal relationships that develop among different nationals in different territorial jurisdictions for different matters. Claims arising from peace-keeping operations involve contractual obligations as well as torts, criminal acts, and damages during hostilities.

Perhaps the largest number of claims against the U.N. derived from the Congo operation,³⁷ which extended far beyond the expectation of

not found possible to arrive at an agreement in this manner, the matter shall be submitted to arbitration at the request of either Party.

Agreement on Legal Status, Facilities, Privileges and Immunities of United Nations Operations in the Congo, Nov. 27, 1961, United Nations-Congo, para. 10(b), 414 U.N.T.S. 229, 235. The same procedure is provided for settlement of civil disputes not related to official duties. *Id.*, para. 10(c).

34. This agreement provides that:

Any claims made by

- (i) a Cypriot citizen in respect of any damages alleged to result from an act or omission of a member of the Force relating to his official duties;
 - (ii) the Government against a member of the Force; or
 - (iii) the Force or the Government against one another,
- that is not covered by paragraphs 39 or 40 of these arrangements, shall be settled by a Claims Commission established for that purpose,

Exchange of Letters Concerning the Status of the United Nations Peace-Keeping Force in Cyprus, Mar. 31, 1964, United Nations-Cyprus, para. 38(b), 492 U.N.T.S. 57, 78.

35. Exchange of Letters on Status of U.N. Emergency Force in Egypt, Feb. 8, 1957, United Nations-Egypt, art. 38, 260 U.N.T.S. 61, 82.

36. Exchange of Letters Concerning U.N. Emergency Force Leave Center in Lebanon, Apr. 20-May 1, 1957, United Nations-Lebanon, 266 U.N.T.S. 125.

37. For an examination of the U.N. operation in the Congo, see D. BOWETT, *supra* note 29, at 242-49.

its initiators. The Congo was, in fact, the first instance in which the U.N. faced the possibility of substantial liability. The majority of the Congo claims were of the so-called "hostility" variety: injuries caused by firing, bombing, irregular requisitioning, and looting. Indeed, to date, most hostility claims against the U.N. derive from the Congo operation. Because of its unique character, the Congo experience need not be regarded as definitive precedent, determining future expectations; yet U.N. reactions to Congo claims have influenced behavior in subsequent peace-keeping operations.

Some injury is bound to occur to the U.N., other entities, or individuals during hostilities. The likelihood of injury increases with the urgency of implementing the mission and the extent to which active measures of self-defense are required. Categorical rejection of liability for injury seems unacceptable, but the circumstances under which injury occurs may determine the degree of the tortfeasor's responsibility and, in some cases, may erase wrongfulness or liability.

By establishing a procedure for the settlement of disputes between the U.N. and nationals of the State where the U.N. force operates, the U.N. appears to have accepted that it, and not the government of that State, is to be liable for injuries resulting from wrongful actions by the peace-keeping forces. This presumption is reinforced by the facts of administrative control. Though the U.N. forces in the Congo were requested by the Congolese government, the forces were under exclusive U.N. control.³⁸ Acts of the force were thus attributed to the U.N. and not to the host government.³⁹

In a letter concluding several post-Congo "global settlement agreements"⁴⁰ with States receiving lump-sum compensation for damages

38. As the Secretary-General put it in his 1960 Report to the Security Council, "[t]he Force is necessarily under the exclusive command of the United Nations, vested in the Secretary-General under the control of the Security Council." First report of the Secretary-General on the implementation of Security Council Resolution 143, 15 U.N. SCOR, Supp. (July-Sept. 1960) 16, 18, U.N. Doc. S/4389 (1960).

39. In this regard, art. 13 of the Report of the International Law Commission on State Responsibility stipulates:

The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

Report of the Int'l Law Comm'n, 30 U.N. GAOR, Supp. (No. 10) 38, U.N. Doc. A/10010/Rev.1 (1975). See also Commentary to art. 13, *id.*, at 40-41.

40. The letter from U Thant to P.H. Spaak (Belgian Foreign Minister) dated July 5, 1964, is quoted by Salmon, *supra* note 25, at 479. The following global settlement agreements were concluded: Exchange of Letters Settling Financial Questions as Regards Former Belgian Military Bases in Congo, Feb. 20, 1965, United Nations-Belgium, 535 U.N.T.S. 191; Exchange of Letters Relating to Settlement of Claims Filed by Swiss Nationals, June 3, 1966, United Nations-Switzerland, 564 U.N.T.S. 193; Exchange of Letters Relating to Settlement of Claims Filed by Greek Nationals, June 20, 1966, United Nations-Greece, 565

caused to their nationals by U.N. forces, the Secretary-General conceded U.N. responsibility for reparation of injury caused by the wrongful acts of its agents. The Soviet representative objected to one such agreement concluded with the Belgian government on the ground that Belgium was the colonial power in the Congo and deserved no compensation. The Secretary-General replied:

It has always been the policy of the United Nations, acting through the Secretary-General, *to compensate individuals who have suffered damages for which the Organization was legally liable. This policy is in keeping with generally recognized legal principles and with the Convention on Privileges and Immunities of the United Nations.* In addition, in regard to the United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of civilian populations during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore.⁴¹

In 1964, in a letter addressed to the Belgian Minister of Foreign Affairs, the Secretary-General characterized U.N. responsibility for reparation for wrongful injuries as "*responsabilité morale*." The word "*morale*" seems to have been intended to minimize U.N. legal responsibility. Such a characterization would appear incompatible with the principles and purposes of the Charter. From a policy standpoint, attempts to minimize the reasonable responsibility of the U.N., while it is expanding and strengthening its activities in international relations, could have a devastating impact on its competence. In its context, the word "*morale*" seems to have been chosen almost reflexively, as a lawyer's device for protecting his client.

The behavior of the U.N. indicates more than a moral responsibility; it is closer to an obligation. In a letter addressed to the President of the Red Cross, the Secretary-General stated: "I also wish to confirm that the United Nations insists on its armed forces in the field applying the principles of the Conventions as scrupulously as possible."⁴² The conventions referred to in the letter were the 1949 Geneva Conventions concerning respect for human rights in armed conflicts.⁴³ Indeed, the

U.N.T.S. 3; Exchange of Letters Relating to Settlement of Claims Filed by Luxembourg Nationals, Dec. 28, 1966, United Nations-Luxembourg, 585 U.N.T.S. 147; Exchange of Letters Relating to Claims by Italian Nationals, Jan. 18, 1967, United Nations-Italy, 588 U.N.T.S. 197.

41. [1967] 2 Y.B. INT'L L. COMM'N 220; [1965] U.N. JURIDICAL Y.B. 41 (emphasis added).

42. 1962 INT'L REV. OF THE RED CROSS 29.

43. Geneva Convention for Amelioration of Condition of Wounded and Sick in Armed Forces in Field, *done* Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for Amelioration of Condition of Wounded, Sick, and Shipwrecked Mem-

regulations governing the U.N. Forces in Congo provide that "[t]he forces shall observe the principles and spirit of the general international conventions applicable to the conduct of military personnel."⁴⁴ Jean Salmon concluded that this Article referred to the applicability of the laws of war to the U.N. operation.⁴⁵ If this conjecture of the intent of the regulation is too broad, it is correct in principle. Though the U.N. is not a party to the Red Cross Conventions or to its 1977 additional protocols, it abides by their principles when involved in "hostility." These principles include minimum requirements for protection of life, safety, and property and remedies if those minimum standards are violated.

The U.N. has persistently denied responsibility for injuries during hostilities that are not attributable to illegal activities of its agents. The organization makes its own decision about what constitutes injury resulting from hostilities and military necessity, presumably taking into account whether its forces have observed a reasonable standard of care. Should a future claimant disagree with a U.N. decision, the U.N. would probably refuse to submit the case to judicial process and would resolve the dispute through negotiations with the claimant and its State.

Injuries during hostilities arising from breach of contract, however, are treated differently. Most of them are settled by arbitration. For example, in 1961 the U.N. contracted with Sabena for the charter of several aircraft, to be operated by Sabena or any of its subcontractors, on U.N.-directed flights in connection with the U.N. mission in the Congo. Among the aircraft provided by Sabena was one belonging to, and operated by Starways Limited, a subcontractor. During an attack by Katangan forces hostile to the U.N., the Starways aircraft was destroyed. In subsequent negotiations, the U.N. agreed to arbitrate the dispute with the liquidator of Starways' successor, British Eagle (Liver-

bers of Armed Forces at Sea, *done* Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention on Treatment of Prisoners of War, *done* Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention on Protection of Civilian Persons in Time of War, *done* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, Additional Protocol, 16 INT'L LEGAL MATERIALS 1391 (1977). The U.N. is not a party to these conventions.

See generally D. BOWETT, *supra* note 29, at 222; F. SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR (1966); Draper, *The Legal Limitations upon the Employment of Weapons by the United Nations Forces in the Congo*, 12 INT'L COMP. L.Q. 387 (1963); Salmon, *supra* note 25; Wijewardane, *Criminal Jurisdiction over Visiting Forces*, 41 BRIT. Y.B. INT'L L. 179 (1968).

44. Draper, *supra* note 43, at 394.

45. Salmon, *supra* note 25, at 480.

pool) Limited. The parties reached a settlement before arbitration.⁴⁶ The innovation here was the U.N.'s agreement to *let an arbitrator decide the question of whether the U.N. had breached a duty of care concerning the safety of the aircraft*. In other claims, the U.N. had not allowed this fundamental question to be raised.

Based on official policies stated in documents and agreements, the U.N. accepts responsibility only for reparation for death and injuries to its "Military Observers" while on U.N. duty.⁴⁷ Voluntarily and without accepting formal responsibility, it has also acceded to claims of members of its peace-keeping operations to pay compensation for death or serious injury suffered during official duties. By the terms of the agreements for peace-keeping forces, the States contributing to the operations, and not the U.N., are responsible for compensating their nationals.⁴⁸ In practice, however, the U.N. has reimbursed States for pensions payable to their nationals. This operational policy was set forth by the Secretary-General in his Report on the Financing of the United Nations Emergency Forces and the U.N. Disengagement Observer Force of 1974.

Death and disability awards to or in respect of members of [peace-keeping] contingents are not covered by or included within the above formulae [regarding the reimbursement of governments that have contributed troops to the peace-keeping forces]. The Secretary-General has continued the practice whereby a troop contributor makes subpayments to beneficiaries as are prescribed under the national legislation of its country and reimbursement is then *claimed from the United Nations for such amounts*.⁴⁹

46. [1969] U.N. JURIDICAL Y.B. 233-34. See also Harpignies, *Settlement of Disputes of a Private Law Character*, 7 REVUE BELGE DE DROIT INTERNATIONAL 451 (1971).

47. Compensation is either \$20,000 or twice the annual salary, whichever is greater. See Field Administration Handbook, U.N. Doc. ST/OGS/L.2/Rev.3, at F-28 -30 (1975). Compensation paid under these rules is the only compensation payable by the United Nations in the case of death, injury, or illness. *Id.*, at F-29, para. 1(d).

48. The regulations governing the United Nations Peace-Keeping Forces in Cyprus, for example, state:

Service-incurred death, injury, or illness. In the event of death, injury or illness of a member of the Force attributable to service with the Force, the respective State from whose military services the member has come will be responsible for such benefits or compensation awards as may be payable under the laws and regulations applicable to service in the armed forces of that State. The Commander shall have responsibility for arrangements concerning the body and personal property of a deceased member of the Force.

U.N. Doc. ST/SGB/UNFICYP/1 (1964). This paragraph reappears in all formal agreements for peace-keeping operations.

49. Financing of the U.N. Emergency Force, Report of the Secretary-General, 29 U.N. GAOR, (Agenda Item 84) 6, U.N. Doc. A/9822 (1974) (emphasis added).

The U.N. thus has accepted wider responsibility for payment of damages to its peace-keeping forces than was originally expected.

C. *Failure to protect the interests of its agents*

In recent years U.N. employees have been increasingly subjects of arbitrary arrest, detainment, or imprisonment in various parts of the world.⁵⁰ Is the U.N. responsible for failing to bring a claim on behalf of an agent injured in the course of duty by the illegal act of a State or State agent in the territorial jurisdiction of that State? Consider a hypothetical case involving X, a U.N. staff member stationed in country Y, who is seriously injured by the illegal act of Government Y. Government Y presents no legal justification for its act, nor does it attempt to compensate X. Is the U.N. obligated to bring a formal claim against Y in accord with principles and procedures expressed by the I.C.J. in the *Reparations Case*⁵¹ and later embodied in General Assembly Resolution 365 (IV) of 1949?⁵² That resolution provides that the Secretary-General is authorized to bring international claims on behalf of injured staff members against the government of a State that is alleged to be responsible for the injury. The Secretary-General is authorized to negotiate with that State to settle the dispute. Failing agreement, the matter may be referred to arbitration.

The issue here is whether the U.N. is under an *obligation* to bring international claims on behalf of its injured staff or instead has *discre-*

50. See U.N. OBSERVER AND INT'L REP., Nov. 3, 1979, at 3; DIPLOMATIC WORLD BULL., Feb. 17, 1979, at 3, 10; N.Y. Times, Oct. 7, 1979, at 10, col. 3; *id.*, Oct. 30, 1979, at 12, col. 1. See also Yu-Long Ling, *A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents*, 33 WASH. & LEE L. REV. 91, 134-37 (1976).

51. *Reparations Case*, [1949] I.C.J. 174.

52. The resolution reads in relevant part:

The General Assembly,

...

Considering that it is highly desirable that reparation be secured for injuries incurred in the service of the United Nations,

...

Consequently

1. *Authorizes* the Secretary-General, in accordance with his proposals, to bring an international claim against the Government of a State, Member or non-member of the United Nations, alleged to be responsible, with a view to obtaining the reparation due in respect of the damage caused to the United Nations and *in respect of the damage caused to the victim or to persons entitled through him* and, if necessary, to submit to arbitration, under appropriate procedures, such claims as cannot be settled by negotiations;

2. *Authorizes* the Secretary-General to take the steps and to negotiate in each particular case the agreements necessary to reconcile action by the United Nations with such rights as may be possessed by the State of which the victim is a national.

G.A. Res. 365, U.N. Doc. A/1101 & Corr. 1, at 200 (1949) (emphasis added).

tion to exercise such a right. If the U.N. is obliged to bring such claims and fails to do so, it might be held liable. If the exercise of such a right is discretionary, failure to press a claim would not render the U.N. liable.

There is no clear language in the *Reparations Case* or in Resolution 365 (IV) on this question. The background of the request for the advisory opinion and of Resolution 365 (IV) was the increasing number of injuries and deaths of U.N. staff in Palestine, and particularly the deaths of Count Bernadotte and Colonel Sérot. These presented the U.N. with legal questions as to its authority and the procedures by which it could bring claims for injuries suffered through actions attributable to States.⁵³ The I.C.J. opinion and the General Assembly resolution both focused on the legal personality of the U.N. *vis-à-vis* States, not on the responsibility of the U.N. to its staff. Hence they provide little guidance on this question. One must perforce turn to the regulations determining the relationship between the staff and the organization, the practice of the U.N., and the practice outside the U.N. system.

The Staff Rules and the Staff Regulations⁵⁴ do not refer to the obligation of the Secretary-General to bring international claims on behalf of injured staff, but they do obligate the Secretary-General, as the Chief Administrator of the organization, to pay compensation to staff injured during the course of their *official* duties. In practice, however, the U.N. has brought international claims against governments of States alleged to have caused injuries to its staff during peace-keeping missions. The great majority of these claims were not settled and the States did not agree to arbitration.

It might be argued that those incidents differ from the hypothetical case, for the regime of peace-keeping operations is determined by agreements with the States providing U.N. *observers* and by the Regulations for Field Manual Operations. Both hold the U.N. responsible for injuries to its agents in those operations. Though the U.N. did not accept liability for injury to peace-keeping forces,⁵⁵ it paid compensation to injured agents while bringing claims against the responsible State. The explanation for this *praeter legem* practice may be simple pragmatism. The U.N. has become increasingly involved in peace-keeping operations, and yet has had almost no success in collecting

53. See *Reparation for Injuries Incurred in the Service of the United Nations*, Memorandum by the Secretary-General, 3 U.N. GAOR, U.N. Doc. A/674 (1948).

54. ST/SGB/Staff Rules/2/Rev.3 (1976); ST/SGB/Staff Rules/1/Rev. 5 (1979); ST/SGB/Staff Rules/Appendix D/Rev.1 (1966).

55. See text accompanying notes 47-48 *supra*.

damages for its injured agents from responsible States. Principles of fairness and considerations of practicality have motivated the U.N. to pay compensation, lest States be reluctant to contribute to operations in the future. Past practice does not clarify policies for our hypothetical case, because X was not on a special field operation and his injuries, at least arguably, did not occur during the performance of his official duties.

National practice with regard to comparable claims by citizens against their own governments for diplomatic protection is pertinent. In general, national courts have held that governments have discretion to extend or withhold diplomatic protection for their citizens injured abroad. In fact, governments have taken steps to protect the interests of their citizens, although not always to the complete satisfaction of those citizens. Though the President of the United States has a statutory duty to extend diplomatic protection,⁵⁶ federal courts always dismiss citizen suits against the Secretary of State for not doing so on the ground that the government has discretion in the discharge of that obligation. The trend of U.S. judicial decisions is conditioned by the general policy of the courts not to interfere with the foreign policy competence of the President. In all the disputed cases, the U.S. did take steps to support the interests of the claimants, and the courts took note of those steps.

In *United States v. Dulles*,⁵⁷ the wife of an American soldier who was tried and imprisoned in France for robbery brought suit against the Secretary of Defense and the Secretary of the Army, alleging that they had failed to perform their respective duties in protecting her husband from prosecution. The appellate court, in agreement with the lower court's dismissal of the claim, viewed the case as one seeking a writ of mandamus compelling the Secretary of State to obtain the soldier's release through diplomatic negotiations with France. Under the NATO

56. Regarding the release of citizens imprisoned by foreign governments, relevant U.S. law provides:

Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, *it shall be the duty* of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

22 U.S.C. § 1732 (1976) (emphasis added).

57. *United States v. Dulles*, 222 F.2d 390 (3d Cir. 1954).

Status of Armed Forces Treaty,⁵⁸ the U.S. was required to have a representative of the Staff Judge Advocate present at the trial. This was done and no unconstitutional irregularities were reported. The court of appeals held that

[the Secretary] was not under a legal duty to attempt through diplomatic processes to obtain [the soldier's] release. Quite to the contrary, the commencement of diplomatic negotiations with a foreign power is completely in the discretion of the President and the head of the Department of State, who is his political agent.⁵⁹

In another case, *Redpath v. Kissinger*,⁶⁰ the plaintiff, an American citizen, claimed that he was incarcerated and tortured by Mexican officials, and that the American Secretary of State, Ambassador to Mexico, Consul, and Consul-General negligently failed and refused to accord him assistance. In dismissing the claim, the district court held that the petitioner received services from the American consular officers. Nothing showed that his arrest and conviction were improper. The Director of Special Consular Services had made a special inquiry into the petitioner's allegations of torture and found no substantiation. In dismissing the complaint, the district court stated that any further action would have to be taken by the Executive Branch through the Secretary of State. The court continued:

The Supreme Court has defined the powers of the courts of the United States with respect to the disposition of matters such as the one under consideration. In *Oetjen v. Central Leather Company*, 246 U.S. 297, 38 S. Ct. 309, 62 L.Ed. 726 . . . it was held that the conduct of foreign relations of the United States is committed by the Constitution to the Executive and Legislative Departments of the government, and the propriety of what may be done in the exercise of these powers is not subject to judicial inquiry or decision.⁶¹

The holding of a Belgian court on a similar issue was rather different. A Belgian sued the U.N. and the Belgian government in the Civil Tribunal of Brussels in 1966 in regard to the Congo operation.⁶² The plaintiff claimed that his property had been burned and looted by U.N. forces. In 1962, he had lodged a claim against the U.N. for compensation. The U.N. disputed the facts of the claim, but, after intercession by the Belgian government, declared that it was prepared to accept

58. Agreement Between Parties to North Atlantic Treaty Regarding Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67.

59. 222 F.2d at 393-94.

60. *Redpath v. Kissinger*, 415 F. Supp. 566 (D. Tex. 1976).

61. *Id.* at 568.

62. *M. v. Organisation des Nations Unies et l'Etat Belge (Ministre des Affaires Etrangères)*, 45 I.L.R. 446 (Civ. Trib. Brussels 1966).

financial liability if the injury was the result of action taken by U.N. agents in violation of the laws of war and the rules of international law.

Before this claim was decided, the U.N. concluded a Global Settlement Agreement with the Belgian government. This Agreement definitively settled all claims brought against the U.N. by Belgian nationals on account of damages to persons and property resulting from the conduct of U.N. forces in the Congo. The sum was determined according to a list of the individual claims for which the U.N. accepted liability, drawn up by its own authorities. The plaintiff was listed, but for less than his claim. One of the claims the plaintiff lodged against the Belgian government was for not having properly defended his interest. The Civil Tribunal of Brussels responded:

If States generally ensure the protection of their nationals abroad and in the face of international organizations, this course of action is only of relative efficacy. *There is, however, no law which imposes obligations upon the executive power in this respect.* In different circumstance certain personages, official or otherwise, did certainly assert that the Belgian State would do everything within its power to ensure the protection in the Congo of its nationals and their property. *Declarations of this sort, which are merely of a vague and general character,* do not bind the executive power in any precise manner.⁶³

The Belgian and American courts used different language. The Civil Tribunal emphasized that no law imposes obligations on the Belgian government to protect the interests of its nationals abroad. The court recognized a general obligation arising from the Belgian government's declaration that it would ensure the protection of its nationals and their property in the Congo, but it rejected any *precise manner* of implementing that obligation. The court stated that the Belgian government had performed its obligation by negotiating the Global Settlement Agreement.⁶⁴ The court emphasized that there was no law, bilateral agreement, or unilateral commitment by the government to guarantee such results.⁶⁵

The policy of American courts has been to refrain from interfering with the President's conduct of foreign policy; the decision of the Belgian court implies that there is a general obligation of the government to protect the interests of its nationals injured abroad, though not in

63. *Id.* at 453 (emphasis added).

64. "In fact, to protect its nationals and their property, the second defendant [the Belgian government] negotiated with the first defendant [the U.N.] in a way that was partially successful, and arrived at the Agreement of 20 February 1965 [the global settlement agreement]. . . ." *Id.*

65. *Id.* at 454.

any precise manner. Both the American and Belgian courts seem concerned only with a demonstration of executive good faith in trying to protect the interests of nationals abroad. In all the above cases, the governments did attempt to protect the interests of their nationals. One might hazard the proposition that, practically, both executives have accepted some general obligations in these matters.

From the standpoint of a policy concerned with the promotion of the independent function of the U.N., the U.N. would appear to have responsibilities to protect the security, safety, and interests of its staff where that staff operates. The Secretary-General *must demonstrate good faith*⁶⁶ by taking measures to protect injured staff members. Of course, the Secretary-General must accommodate organizational interests and effectiveness with the interests of individual staff members and of host States. Host States can hardly claim a legitimate interest in failing to afford appropriate legal processes for investigation and judgment on charges they make against U.N. staff. In principle, the independence of the U.N. is better served by protecting the independence and safety of international civil servants.⁶⁷ An expectation that steps will be taken for the protection and safety of U.N. agents is essential to staff morale and to the effective functioning of the organization. Otherwise, U.N. agents might seek support and security through other sources which could compromise their independence as international civil servants.

May the Secretary-General bring claims against the State of nationality of a staff member? In cases of double nationality, diplomatic protection generally may not be extended under international law by one of the States to its national when the national is in the territory of the other State of his or her nationality. If this doctrine were applicable, the Secretary-General could not bring international claims against the State of nationality of its staff member. But the practice of double nationality is not applicable to the U.N. For one thing, the analogy is inapposite; staff status is not akin to nationality. Indeed, the need to protect an official's independence from his State of nationality has long been recognized.⁶⁸ Moreover, under Article V of the Convention on

66. The principle of good faith has been adopted by IO administrative tribunals as a general principle of law. M. AKEHURST, *THE LAW GOVERNING EMPLOYMENT IN INTERNATIONAL ORGANIZATIONS* 72-73 (1967).

67. A staff will not be efficient, willing, and loyal unless its morale is high. The morale of a staff is affected by the conditions under which it works. A. LOVEDAY, *REFLECTIONS ON INTERNATIONAL ADMINISTRATION* (1956).

68. The first Secretary-General of the League of Nations observed in 1925: "In theory, at any rate, an official might find diplomatic privileges particularly necessary, as far as his own Government was concerned." Letter of June 11, 1925 to head of Federal Political Dep't

Privileges and Immunities,⁶⁹ Member States are obligated to refrain from exercising their competence over citizens who are U.N. officials.⁷⁰ The Secretary-General thus should have power to lodge international claims against a staff member's State for injuries allegedly suffered by the staff member.

D. *Acts Ultra Vires*

An international organization is a creature of limited powers. Whatever immunity it may enjoy will not extend to acts which exceed its jurisdiction or powers, acts commonly described as *ultra vires* or in *excès de pouvoir*.

Ultra vires acts may be the result of misallocation of competences within the internal structure of IOs. The I.C.J. suggested that an act illegal in terms of allocation of competences within the U.N. will not necessarily be void *vis-à-vis* third parties.⁷¹ That does not mean that in all cases a commitment concluded in violation of internal allocations of competence will be upheld, but it does mean that third parties should not be penalized by termination of an arrangement on which they relied in good faith.⁷² While the problem of *ultra vires* acts applies to all IOs, the discussion here will refer to problems that may be pending with regard to the Council for Namibia, in particular the possibilities of claims against the Council by States or by the future State of Namibia for acts allegedly beyond the authority of the Council.

of Switzerland, L.N. Doc. C.66 (1925), reprinted in M. HILL, IMMUNITIES AND PRIVILEGES OF INTERNATIONAL OFFICIALS 166 (1947). Similarly, scholars unanimously recognize and endorse the unique necessity for immunity of U.N. employees from the influence of their own countries. *E.g., id.* at 98-99; D. BOWETT, *supra* note 10, at 320; C. JENKS, INTERNATIONAL IMMUNITIES 112 (1961).

In the *Reparations Case*, the I.C.J. stated that if a U.N. official "had to rely on that State [of which he was a national], his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter." [1949] I.C.J. at 183.

69. Convention on Privileges and Immunities of the United Nations, done Feb. 13, 1946, art. V, 21 U.S.T. 1418, T.I.A.S. No. 6900, 1 U.N.T.S. 15, 24-26.

70. As the I.C.J. stated in the *Reparations Case*, this convention creates *rights* and *duties* between the organization and each of the signatories. [1949] I.C.J. at 179.

The convention provides that it shall

continue in force as between the United Nations and every Member which has deposited an instrument of accession for so long as that Member remains a Member of the United Nations, or until a revised general convention has been approved by the General Assembly and that Member has become a party to this revised convention.

Convention on Privileges and Immunities of the United Nations, *supra* note 69, § 35.

71. Advisory Opinion on Certain Expenses of the United Nations, [1962] I.C.J. 151, 168.

72. See D. BOWETT, *supra* note 10, at 325. For a general study of *ultra vires* acts committed by IOs, see Lauterpacht, *The Legal Effects of Illegal Acts of International Organizations*, in CAMBRIDGE ESSAYS IN INTERNATIONAL LAW 88-121 (1965).

Since General Assembly Resolution 2248 (S-V) of May, 1967,⁷³ the Council has been representing Namibia, first as an observer and, by a later decision of the General Assembly, as a full member in U.N. meetings and conferences.⁷⁴ In addition, the Council has undertaken other functions, such as issuing identity certificates and travel documents to Namibians. The Council has already concluded agreements with more than 90 countries concerning travel arrangements for Namibians.⁷⁵ It has concluded agreements with Zambia for the establishment of an Institute in Lusaka for training Namibians as civil servants of the future independent State of Namibia.⁷⁶ On September 27, 1974, the Council enacted Decree No. 1 for the protection of the natural resources of Namibia,⁷⁷ and it has acted as trustee for the United Nations Fund for Namibia.⁷⁸ It has also been authorized by the General Assembly to

73. The resolution reads in relevant part:
The General Assembly,

...

1. *Decides* to establish a United Nations Council for South West Africa (hereinafter referred to as the Council) comprising eleven Member States to be elected during the present session and to entrust to it the following powers and functions, to be discharged in the Territory:

(a) To administer South West Africa until independence, with the maximum possible participation of the people of the Territory;

(b) To promulgate such laws, decrees and administrative regulations as are necessary for the administration of the Territory until a legislative assembly is established following elections conducted on the basis of universal adult suffrage;

(c) To take as an immediate task all the necessary measures, in consultation with the people of the Territory, for the establishment of a constituent assembly to draw up a constitution on the basis of which elections will be held for the establishment of a legislative assembly and a responsible government;

(d) To take all the necessary measures for the maintenance of law and order in the Territory;

(e) To transfer all powers to the people of the Territory upon the declaration of independence;

2. *Decides* that in the exercise of its powers and in the discharge of its functions the Council shall be responsible to the General Assembly.

G.A. Res. 2248 (S-V), Fifth Special Session, Supp. (No. 1), U.N. Doc. A/L.516/Rev.1 (1967).

74. Relevant General Assembly resolutions are: G.A. Res. 3111, 28 U.N. GAOR, Supp. (No. 30) 93, U.N. Doc. A/9030 (1974); G.A. Res. 3067, 28 U.N. GAOR, Supp. (No. 30) 13, U.N. Doc. A/9030 (1974); G.A. Res. 3104, 28 U.N. GAOR, Supp. (No. 30) 143, U.N. Doc. A/9030 (1974); G.A. Res. 3295, 29 U.N. GAOR, Supp. (No. 31) 106, U.N. Doc. A/9631 (1975); G.A. Res. 3399, 30 U.N. GAOR, Supp. (No. 34) 104, U.N. Doc. A/10034 (1976); G.A. Res. 31/108, 31 U.N. GAOR, Supp. (No. 39) 58, U.N. Doc. A/31/39 (1977); G.A. Res. 31/147, 31 U.N. GAOR, Supp. (No. 39) 132, U.N. Doc. A/31/39 (1977); G.A. Res. 31/149, 31 U.N. GAOR, Supp. (No. 39) 134, U.N. Doc. A/31/39 (1977); G.A. Res. 31/179, 31 U.N. GAOR, Supp. (No. 39) 82, U.N. Doc. A/31/39 (1977); G.A. Res. 31/9, 32 U.N. GAOR, Supp. (No. 45) 19, U.N. Doc. A/32/45 (1978).

75. 32 U.N. GAOR, Supp. (No. 24) 43, U.N. Doc. A/32/24 (1977).

76. 30 U.N. GAOR, Supp. (No. 24) 54, U.N. Doc. A/10024 (1976).

77. For reference to this decree, see G.A. Res. 3399, 30 U.N. GAOR, Supp. (No. 34) 104, U.N. Doc. A/10034 (1976).

78. G.A. Res. 3112, 28 U.N. GAOR, Supp. (No. 30) 95, U.N. Doc. A/9030 (1974).

seek effective means to regulate foreign economic entities operating in Namibia,⁷⁹ to seek to replace South Africa as the party representing Namibia in all relevant bilateral and multilateral treaties,⁸⁰ to direct and coordinate the implementation of the Nationhood Program for Namibia in consultation with SWAPO,⁸¹ and to assign radio frequencies.⁸² Recently, there has been some discussion as to whether the Council can become party to a convention on behalf of Namibia. This issue raises in sharpest form the question of the extent of the Council's authority to bind the future state of Namibia. If the Council acts beyond its authority, States suffering injuries, including the future State of Namibia, might be potential claimants against the Council, and consequently against the U.N.

The Council of Namibia is a unique and virtually unprecedented creation in international relations. As a U.N. organ and as an administering authority, it has two functions. They raise the question of the extent of the authority of the Council. Many functions of an administering authority are not compatible with the authority of a U.N. organ. Moreover, the scope of authority of a U.N. organ may prove too limited effectively to administer a territory to independence. When the U.N. decided to undertake direct administration of Namibia and to lead it toward independence, it had to establish a body for that function. From the bureaucratic point of view, a body established within the U.N. system was easier to manage, finance, and influence. Because the Council consists of a number of States Members of the U.N., elected by the General Assembly, ultimate responsibility for the Council's work is arguably borne by the U.N. This consideration might lead to a narrow construction of the Council's competence. On the other hand, as an administering authority, the Council has a political function that a U.N. organ lacks. The fulfillment of that function cannot be handicapped by the inherent limited authority of a U.N. organ, for that would frustrate the Council's very *raison d'être*.

The Council is responsible for all measures leading to Namibian independence. Actions taken by the Council should facilitate and hasten the process of independence. The Council's authority should not be confused with that of a State or a Government. The Council is neither.

79. G.A. Res. 3031, 27 U.N. GAOR, Supp. (No. 30) 88, U.N. Doc. A/8730 (1972).

80. *Id.*

81. G.A. Res. 31/147, 31 U.N. GAOR, Supp. (No. 39) 133, U.N. Doc. A/31/39 (1976); G.A. Res. 31/148, 31 U.N. GAOR, Supp. (No. 39) 133, U.N. Doc. A/31/39 (1976); G.A. Res. 31/150, 31 U.N. GAOR, Supp. (No. 39) 134, U.N. Doc. A/31/39 (1976); G.A. Res. 31/153, 31 U.N. GAOR, Supp. (No. 39) 136, U.N. Doc. A/31/39 (1976).

82. G.A. Res. 32/9C, 32 U.N. GAOR, Supp. (No. 45) 15, U.N. Doc. A/32/45 (1977).

It is an organization with a limited authority, part of which has traditionally been associated only with States. In situations where the functions of the Council and those of a State are the same, similar competence may be presumed for both.⁸³ The Council has been empowered by General Assembly Resolution 3031 (XXVII) "to seek to replace South Africa as the party representing Namibia in all relevant bilateral and multilateral treaties."⁸⁴ The authority of the Council is limited, however, to actions leading to the independence of the territory. While the Council may ratify a treaty, the treaty must facilitate the independence of Namibia. Were the Council to act beyond its authority, purporting to bind the future State of Namibia with obligations not relevant to its independence, the Council, and derivatively the U.N., might be held responsible.

The procedure for bringing State claims against the Council is not clear. Under Article 81 of the Charter,⁸⁵ an administering authority may be one or more States of the organization itself, but with the exception of the Council and the U.N.T.E.A. for West Irian, administering authorities have always been individual States. In all trusteeship agreements with States, a provision has provided for claims by Member States against the administering authority.⁸⁶ A similar provision appeared in agreements relating to the mandate system. On that basis, Ethiopia and Liberia unsuccessfully sued South Africa in the I.C.J. for that country's misconduct as the mandatory power of South West Africa.⁸⁷

Such provisions have not been enacted in relation to the Council for Namibia. Because every major move taken by the Council has been either authorized or subsequently approved by General Assembly resolutions, there appears to be no expectation of future claims against the Council as such. The General Assembly's endorsement does not, however, necessarily eliminate the possibility of future claims.⁸⁸ In its 1971

83. See text accompanying notes 76, 77, & 81 *supra*.

84. G.A. Res. 3031, 27 U.N. GAOR, Supp. (No. 30) 88, 89, U.N. Doc. A/8730 (1973).

85. U.N. CHARTER art. 81.

86. For example, the agreement establishing the trusteeship for the Cameroons provides: If any dispute whatever should arise between the Administering Authority and another Member of the United Nations relating to the interpretation or application of the provisions of this Agreement, such dispute, if it cannot be settled by negotiation or other means, shall be submitted to the International Court of Justice, provided for in Chapter XIV of the United Nations Charter.

Trusteeship Agreement for the Territory of the Cameroons, Dec. 13, 1946, United Nations-United Kingdom, art. 19, 8 U.N.T.S. 119, 132.

87. South-West Africa Cases I, [1962] I.C.J. 13.

88. In the *Reparations Case*, the I.C.J. described the U.N. as a subject of international law, having a distinctive legal personality and capable of possessing both rights and duties.

advisory opinion on Namibia, the I.C.J. indicated its willingness to appraise the activities, not only of the South African government, but also of the Security Council and of the General Assembly for conformity to fundamental law.⁸⁹ Indeed, in two cases, the Court did review the lawfulness of acts by constituent bodies of IOs.⁹⁰ The I.C.J. would have the competence to render an advisory opinion on the request of the General Assembly or of the Security Council on the activities of the Council for Namibia. If authorized, the I.C.J. might declare void an illegal act of the Council, even though that act had been endorsed by the General Assembly.

E. *Violation of International Agreements*

The term "international agreements" is used here to refer to agreements between IOs or between IOs and States. The U.N. has concluded a large number of such agreements.⁹¹ Article 43 of the U.N. Charter⁹² empowers the Security Council to enter into agreements with Member States or groups of Member States regarding armed forces,

See note 70 *supra*. Activities in violation of fundamental law might be brought within the confines of classic *excès de pouvoir*. Professors McDougal, Lasswell, and Chen draw a similar conclusion in relation to violation of principles of human rights by IOs and their officials. M. McDOUGAL, H. LASSWELL, & L. CHEN, *supra* note 6, at 334.

Some IOs make explicit provisions for review of lawfulness of acts done by constituent bodies. *See* Lauterpacht, *supra* note 72, at 94-99; McRae, *Legal Obligations and International Organizations*, 11 CAN. Y.B. INT'L L. 87 (1973).

89. Legal Consequences for States of the Continued Presence of South Africa in Namibia, [1971] I.C.J. 6, 45. *See also* M. McDOUGAL, H. LASSWELL, & L. CHEN, *supra* note 6, at 334-35.

90. Advisory Opinion on the Constitution of the Maritime Safety Commission of the I.M.C.O., [1960] I.C.J. 150; Certain Expenses of the United Nations, [1962] I.C.J. 151. For a discussion of these cases, *see* Lauterpacht, *supra* note 72, at 100-16; D. BOWETT, *supra* note 10, at 250-52, 323-25.

91. The U.N. has concluded agreements with both member and non-member States and with other IOs. These agreements concern technical assistance; *ad hoc* conferences or seminars; permanent installations (*e.g.*, information centers or regional economic commissions); operations of subsidiary organs (*e.g.*, UNICEF and the United Nations Relief and Works Agency for Palestine Refugees in the Near East (U.N.R.W.A.)); the status of forces involved in peace-keeping operations; provision of peace-keeping troops; and communication and associated facilities (*e.g.*, stamp sales, mail dispatch, and radio operations). *See, e.g.*, Agreement on the Ariana Site, July 1, 1946, United Nations-Switzerland, 1 U.N.T.S. 153; Exchange of Letters on Privileges and Immunities of the United Nations, Sept. 21, 1951, United Nations-Korea, 104 U.N.T.S. 323; Agreement on Privileges and Immunities of the United Nations, July 25, 1952, United Nations-Japan, 135 U.N.T.S. 305.

In response to an inquiry by the International Law Commission Special Rapporteur on the Law of Treaties, the U.N. Office of Legal Affairs provided a survey of U.N. arrangements with States that correspond to credentials or full powers. *See* [1967] 2 Y.B. INT'L L. COMM'N 222. For a discussion of U.N. treaties with States and IOs, *see* Parry, *Treaty-Making Power of the United Nations*, 26 BRIT. Y.B. INT'L L. 108, 131-47 (1950); G. WEISSBERG, *supra* note 10, at 38-69.

92. U.N. CHARTER art. 43.

assistance, and facilities necessary for maintaining international peace and security. These agreements "shall be subject to ratification by the signatory States in accordance with their constitutional processes." In the *Reparations Case*,⁹³ the I.C.J. stated that the U.N. also becomes party to international agreements concluded under the trusteeship provisions of the Charter.⁹⁴ By virtue of Article 105 of the Charter,⁹⁵ the U.N. is a party to the Convention on Privileges and Immunities, "which binds the United Nations as an Organization on the one part, and each of its Members individually, on the other part."⁹⁶

The Court also stated that the U.N. "must be deemed to have those powers which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."⁹⁷ On the strength of this dictum, the I.L.C.'s Special Rapporteur on the Law of Treaties proposed that the I.L.C. consider adopting a provision recognizing the capacity of subjects of international law other than States to conclude treaties when invested with the capacity to do so by treaty or custom.⁹⁸ Though the I.L.C. decided that the 1969 Vienna Convention on the Law of Treaties should deal only with agreements between States, it "fully accepted that international organizations may possess treaty-making capacity and that international agreements concluded by international organizations possessing such capacity fall within the scope of the law of treaties."⁹⁹ Moreover, the regulations adopted by the General Assembly to

93. *Reparations Case*, [1949] I.C.J. 174.

94. Trusteeship agreements do not become effective until approved and authorized by the competent U.N. organs.

95. U.N. CHARTER art. 105.

96. Oral Argument of Counsel for Secretary-General, *Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Pleadings 71 (1949).

97. *Reparations Case*, [1949] I.C.J. at 182.

98. First Report on the Law of Treaties, [1962] 2 Y.B. INT'L L. COMM'N 30, 35, U.N. Doc. A/CN.4/SER.A/1962/Add.1.

For a discussion of the international personality of IOs and their capacity to conclude agreements, see H. CHIU, *THE CAPACITY OF INTERNATIONAL ORGANIZATIONS TO CONCLUDE TREATIES AND THE SPECIAL LEGAL ASPECTS OF THE TREATIES SO CONCLUDED* (1966); H. KELSEN, *supra* note 10; Hartmann, *The Capacity of International Organizations to Conclude Treaties*, in *AGREEMENTS OF INTERNATIONAL ORGANIZATIONS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES* 127 (K. Zemanek ed. 1971); McRae, *Cooperation Agreements and the Law Relating to Agreements Concluded by International Organizations*, in *id.*, at 1, 5-6; Osakwe, *The Concept and Forms of Treaties Concluded by International Organizations*, in *id.*, at 165; van Wouw, *Formal Aspects of the Technical Assistance Agreements Concluded by the U.N. Family of Organizations*, in *id.*, at 105; Hahn, *supra* note 10; Osakwe, *Contemporary Soviet Doctrine on the Judicial Nature of Universal International Organizations*, 65 AM. J. INT'L L. 502 (1971); Rosenne, *United Nations Treaty Practice*, 86 HAGUE RECUEIL 281 (1954); Smith, *The Conclusion of International Agreements by International Organizations*, 2 LOY. CHI. L.J. 27 (1971).

99. First Report on the Law of Treaties, *supra* note 98, at 30. The 1969 Vienna Confer-

give effect to Article 102 of the Charter concerning treaty registration expressly refer to cases where the U.N. is a party to a treaty or an agreement.¹⁰⁰

The E.E.C. has concluded treaties on tariff, commercial, and association matters under Articles 111, 113, and 238 of its Statute.¹⁰¹ Association agreements have been concluded with Greece, Turkey, Malta, and a number of African countries.¹⁰² Initially, the E.E.C. attended the Commodity Conferences as an observer or participant without a vote. Later it participated as a member with voting rights (exercised through collective votes of its members) and became party to commodity conventions which provided for the E.E.C.'s participation and accession.¹⁰³ The E.E.C. has also become party to other commodity agreements pro-

ence recommended that the General Assembly refer the question of treaties concluded between States and IOs or between two or more IOs to the International Law Commission for study in consultation with the principal IOs. Report of the International Law Commission, 29 U.N. GAOR, Supp. (No. 10) 129, U.N. Doc. A/9610/Rev.1 (1974). The General Assembly referred the question to the International Law Commission in G.A. Res. 2501, 24 U.N. GAOR, Supp. (No. 30) 97, U.N. Doc. A/7630 (1970). The Commission appointed Mr. Reuter as Special Rapporteur. His report follows the form and substance of the Vienna Convention. So far a complete set of draft articles have been adopted by the International Law Commission. See Report of the International Law Commission, 35 U.N. GAOR, Supp. (No. 10) 136-78, U.N. Doc. A/35/10 (1980).

The International Law Commission attempt is a response to the increasing participation of IOs in making treaties. The draft articles modelled on the Vienna Convention do not, however, deal with remedies. In the absence of codification, this is a matter that must be dealt with in the treaties themselves.

100. U.N. CHARTER art. 102.

101. Treaty of Rome, *supra* note 24, arts. 111, 113, 238.

102. Malawer, *Treaty-Making Competence of the European Communities*, 7 J. WORLD TRADE L. 169, 175 (1973). For the treaty-making power of the E.E.C., and particularly the allocation of competences within the E.E.C., see P. KAPTEYN & P. VELOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES (1973); Costonis, *The Treaty-Making Power of the European Economic Community*, 5 COMMON MKT. L. REV. 421 (1968); Costonis, *The Treaty-Making Power of the European Community: Article 238 and Assoc. Agreements*, [1967] EUR. Y.B. 31 (Council of Europe); Feld, *The Competences of the European Communities for the Conduct of External Relations*, 43 TEX. L. REV. 891 (1965).

The most important case in this area has been the E.R.T.A. Case, No. 22/70. See COMMON MKT. L. REV. 392 (1971).

103. The first such commodity agreement, the International Wheat Agreement of 1971, provided that:

Any reference in this Convention to a "Government" represented at the United Nations Wheat Conference, 1971 shall be construed as including a reference to the European Economic Community (hereinafter referred to as the E.E.C.). Accordingly, any reference in the Convention to "signature" or to the "deposit of instruments of ratification, acceptance or approval" or "an instrument of accession" or a "declaration of provisional application" by a Government shall, in the case of the E.E.C. be construed as including its competent authority and the deposit of the instrument required by institutional procedures of the E.E.C. to be deposited for the conclusion of an international agreement.

International Wheat Agreement, *opened for signature* Mar. 29-May 3, 1971, § 1(n), 22 U.S.T. 821, T.I.A.S. No. 7144, 800 U.N.T.S. 45, 54. The sugar agreements of 1973 and 1977 contained similar provisions. International Sugar Agreement, Oct. 13, 1973, art. II, § 11, U.N.

viding for participation and accession of "intergovernmental organizations" not limited to the E.E.C.¹⁰⁴ In another area, the E.E.C. has joined the 1976 Convention for the Protection of the Mediterranean Sea Against Pollution.¹⁰⁵

The above conventions impose a rather limited responsibility on their members. In the 1978 Geneva session of the Law of the Sea Conference, proposals to allow the E.E.C. to become party to the future Law of the Sea Convention were put forward. The subject is still under consideration. If accepted, the E.E.C. could be the first international organization to become a party to a sweeping international convention establishing extensive legal responsibilities with potential for future liability.

III. The Decision Processes

The variety of arenas in which decisions about responsibility are made relate primarily to the status of different claimants and the circumstances in which injuries occur. Most disputes regarding IOs' responsibilities have been settled through informal methods. This practice may be attributed mainly to the political overtone surrounding many IO activities. Complainants may also lack awareness or precedent for processing disputes through more formal arenas, or they may be insecure about the outcome of formal processes. Nevertheless, several formal judicial arenas exist in which claims regarding IO responsibility may be submitted. Some of these arenas have been provided for in IOs' constituent instruments, some have been created by IOs themselves, and some have resulted from the expanded competence of IOs through development of international or domestic law. This section will examine negotiation, arbitration, claims commissions, national courts, the I.C.J., and administrative tribunals.

A. *Negotiation*

In most legal disputes, negotiation is the first step in resolving a conflict. This method of dispute settlement is preferred by IOs, particu-

Doc. TD/SUGAR.8/4 (1973); International Sugar Agreement, *done* Oct. 7, 1977, art. 2, § 23, T.I.A.S. No. 9664.

104. International Cocoa Agreement, *concluded* Oct. 21, 1972, art. 4, 882 U.N.T.S. 67; International Coffee Agreement, *opened for signature* Jan. 31-July 31, 1976, art. 4, § 3, 28 U.S.T. 6401, T.I.A.S. No. 8683; International Tin Agreement, *done* June 21, 1975, art. 54, 28 U.S.T. 4619, T.I.A.S. No. 8607, U.N. Doc. TD/TIN.5/10 & TD/TIN.5/10/Corr.1-4 (1975). Although these commodity agreements provide for the accession of any competent IO, so far only the E.E.C. has ratified them.

105. For the final act of the conference, see 15 INT'L LEGAL MATERIALS 285 (1976).

larly those with extensive immunities.¹⁰⁶ Most of the claims against the U.N. and the specialized agencies have been resolved by negotiation. The preference for this method as the first step for dispute settlement is expressed in all agreements between the U.N. and other parties.¹⁰⁷ Negotiation has been recommended as the preferred method of dispute settlement in General Assembly Resolution 365 (IV), which authorizes the Secretary-General to bring international claims against States alleged to have injured his agents. The resolution provides that he may submit disputes to arbitration if they cannot be settled by negotiation.¹⁰⁸

B. *Arbitral Tribunals*

Arbitration is a common mode of dispute settlement concerning transactions between third parties and IOs, particularly those with extensive immunities. Almost all contracts to which the U.N. is a party contain a standard arbitration clause:

Arbitration shall be the sole means of resolving any dispute or differences which may arise out of the contract or the carrying out of the works. . . . All arbitration under this contract shall be in accordance with the rules then in force of the International Chamber of Commerce. The award of such arbitration shall be final and binding on the parties.¹⁰⁹

There is usually a single arbitrator. Arbitration has also been provided for in the Headquarters Agreement¹¹⁰ and for settlement of disputes

106. For IOs with extensive immunities, the only methods of dispute settlement are negotiation and arbitration (if agreed to in advance). These IOs will not waive their immunity under any condition, particularly when dealing with private parties. At the same time, in order to guarantee their good faith with the contracting party, they must propose a method of dispute settlement. Normally the method proposed is negotiation, with later arbitration if necessary.

107. Virtually all U.N. service contracts include such a provision. These contracts are unpublished.

108. G.A. Res. 365, U.N. Doc. A/1101, at 200 (1949).

109. These contracts are unpublished. For the place of arbitration, see [1964] U.N. JURIDICAL Y.B. 223-24.

110. This agreement provides:

21. (a) Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice.

(b) The Secretary-General or the United States may ask the General Assembly to request of the International Court of Justice an advisory opinion on any legal question arising in the course of such proceedings. Pending the receipt of the opinion of the Court, an interim decision of the arbitral tribunal shall be observed by both parties. Thereafter, the arbitral tribunal shall render a final decision, having regard to the opinion of the Court.

between host States and the U.N. regarding the interpretation and application of agreements on peace-keeping operations.¹¹¹ Arbitration may be chosen for disputes regarding the "privileges and immunities of the U.N."¹¹²

In agreements defining the relationship between the U.N. and the specialized agencies, no provision for arbitration is made. The Administrative Committee on Coordination is probably the appropriate body to settle disputes. Outside the U.N. family, the use of arbitration is not common. Headquarters Agreements between France and the Council of Europe, or the E.E.C., and between the U.S. and the O.A.S. contain no arbitration clause.

C. *Claims Commissions*

All agreements between the U.N. and host countries concerning the status of U.N. peace-keeping forces include provision for a claims commission to decide claims made by:

- (i) a citizen of the host country in respect of damages alleged to result from an act or omission of a member of the Force relating to his official duties;
- (ii) the Government against a member of the Force; or
- (iii) the Force or the Government against one another.¹¹³

While a claims commission is a formal arbitral tribunal composed of three judges, the scope of its activities is limited. Of the three arbitrators, two are appointed separately by the Secretary-General and the

Headquarters Agreement, June 26, 1947, United Nations-United States, § 21, 61 Stat. 3416, T.I.A.S. No. 1676, 11 U.N.T.S. 11.

111. See notes 32 & 34-37 and accompanying text *supra*.

112. The Convention on the Privileges and Immunities of the United Nations provides that the I.C.J. is the appropriate decision-maker on claims regarding the interpretation and application of the convention, unless the parties have agreed on "another mode of settlement." Convention on Privileges and Immunities of the United Nations, *supra* note 69, § 30. That proviso would appear to refer to negotiation and arbitration. The headquarters agreement of the U.N. Economic Commission for Latin America refers to section 30 as a settlement method in the event of disputes on privileges and immunities. Agreement for Headquarters of the U.N. Economic Commission for Latin America, Feb. 16, 1953, United Nations-Chile, § 21, 314 U.N.T.S. 49.

Some States have made reservations regarding the reference to the I.C.J. in section 30. Those States are Albania, Algeria, Bulgaria, Byelorussian S.S.R., Czechoslovakia, Hungary, Mongolia, Nepal, Romania, Ukrainian S.S.R., and the Soviet Union. The United Kingdom notified the Secretary-General that it objects to the reservations made by Albania, Byelorussian S.S.R., Czechoslovakia, Hungary, Romania, the Soviet Union, and the Ukrainian S.S.R. Lebanon notified the Secretary-General that it objects to the reservation of the Soviet Union. See *Relations Between States and Inter-Governmental Organizations*, [1967] 2 Y.B. INT'L L. COMM'N 133, 296, U.N. Doc. A/CN.4/SER.A/1967/Add.1.

113. See, e.g., Exchange of Letters Concerning Status of the United Nations Peace-Keeping Force in Cyprus, Mar. 31, 1964, United Nations-Cyprus, para. 38(b), 492 U.N.T.S. 57.

host State, and the chairman is appointed jointly by the Secretary-General and the host State. The arbitrators need not be lawyers, and they may participate in settlement of the claims.¹¹⁴ Awards made by a claims commission against the Force or a member thereof or against the Government are to be referred for satisfaction to the Commander of the Force or to the Government, as the case may be.¹¹⁵ The agreements do not indicate whether the decision of a claims commission is final. To date, no claims commission has been established.

D. *National Courts*

The distinctive feature about dispute settlement in national courts is the doctrine of organizational immunity. Because of their functions, IOs need immunities to protect them from improper influence by Member States and to prevent interruption of work. Immunity, however, does not necessarily mean "absolute" immunity, for not all activities undertaken by IOs are within their principal functions. IOs may conduct activities of a so-called private law nature that only minimally affect their major functions, but that may have adverse impact on the public order of a particular State. The appropriate degree of immunity of IOs from suits in local courts should depend on (1) the nature of the IOs (the degree of universality), (2) the purpose of the IOs (the extensiveness of the function), (3) the intention of IO members as expressed in the constituent instruments of IOs and subsequent agreements, (4) practice, and (5) the particular acts in question.

The U.N. seems to be the only IO whose absolute immunity is implied in its constitution and confirmed in the subsequent agreements with its Member States. Under Article 105 of the Charter¹¹⁶ and under the Convention on Privileges and Immunities,¹¹⁷ the U.N. is immune from the jurisdiction of local courts.

Article 105 has been interpreted in several suits against the U.N. as providing absolute immunity from suit in local courts. In *Nissan v. Attorney-General*,¹¹⁸ a British subject, the tenant of a hotel in Cyprus

114. See, e.g., *id.* at 80.

115. See also Agreement on Legal Status, Facilities, Privileges, and Immunities of the United Nations Organization in the Congo, Nov. 27, 1961, para. 11, United Nations-Congo, 414 U.N.T.S. 229.

116. "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." U.N. CHARTER art. 105. Paragraph 3 of the same article authorizes the General Assembly to specify the details of the immunity. The Convention on the Privileges and Immunities of the United Nations provides for absolute immunity.

117. Convention on Privileges and Immunities of the United Nations, *supra* note 69, § 2.

118. *Nissan v. Attorney-General*, [1968] 1 Q.B. 286, [1970] A.C. 179 (H.L.).

occupied by British troops before and after they joined the U.N. Peace-keeping Force in Cyprus (U.N.F.I.CYP), brought suit for compensation and damages from the British government. On appeal, the House of Lords held that the British troops were responsible for injuries they caused before they joined the U.N. force. As for injuries they caused after they became part of U.N.F.I.CYP, an organ of the U.N., they enjoyed the status, privileges, and immunities of the Organization, and British courts had no jurisdiction over them.

The Brussels Appeals Court went much further in *Mandelier v. United Nations and Belgian State*.¹¹⁹ In response to a claim made by a Belgian who had suffered injuries allegedly "as a result of abuses committed by U.N. Forces in the Congo,"¹²⁰ the Court stated that the immunity from every form of legal process granted to the U.N. under the Convention on Privileges and Immunities is unconditional. The Court held that the organization's immunity is limited neither by Article VIII, Section 29 of the Convention (requiring that the U.N. provide some procedure for settlement of disputes), nor by Article 10 of the Universal Declaration on Human Rights (stating that everyone is entitled to a hearing by a tribunal in the determination of his rights and obligations),¹²¹ nor by Article 105 of the U.N. Charter¹²² (referring to the immunities *necessary* for the work of the organization). Similar decisions have been rendered in Chile,¹²³ the U.S.,¹²⁴ and Mexico.¹²⁵

In a few instances, national courts have issued default judgments against the U.N. In *X v. U.N.R.W.A.*,¹²⁶ execution was dropped after communication with the Foreign Ministry of Lebanon. But a Jordanian court, in *Y v. U.N.R.W.A.*,¹²⁷ issued a default judgment and execution in spite of claims of immunity. There was, however, no further action to continue the claim.

Sometimes limited immunity is stated in an IO's constitution or a subsequent document. Thus the competence of national courts is accepted in the constituent instruments of a number of financial IOs. For

119. Judgment of Sept. 15, 1969, Brussels Appeals Court, [1969] U.N. JURIDICAL Y.B. 236. See [1966] U.N. JURIDICAL Y.B. 283 for proceedings in the Brussels Court of First Instance.

120. [1969] U.N. JURIDICAL Y.B. 236.

121. G.A. Res. 217, U.N. Doc. A/777, at 535 (1948).

122. U.N. CHARTER art. 105.

123. [1969] U.N. JURIDICAL Y.B. 237.

124. *Id.* at 243.

125. See Annual Report of the Secretary-General on the Work of the Organization, 9 U.N. GAOR, Supp. (No. 1) 1, 105-06, U.N. Doc. A/2663 (1954).

126. *Id.* at 106.

127. *Id.* at 106-07.

example, Article VII (3) of the Constitution of the International Bank for Reconstruction and Development (I.B.R.D.) provides that the Bank may be sued in the municipal courts of any member country where the bank has an office, has appointed an agent to accept service of process, or has issued or guaranteed securities, provided that the plaintiff is not a Member State or someone claiming through a Member State.¹²⁸

These provisions in the constitutions of financial institutions have been considered as waivers of immunities. When the Inter-American Development Bank claimed immunity from suit in U.S. courts¹²⁹ under the International Organizations Immunities Act (I.O.I.A.),¹³⁰ the U.S. Court of Appeals for the District of Columbia held that Article XI, Section 3 of the Agreement Establishing the Inter-American Development Bank expressly waived immunity. That Article provides:

Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.¹³¹

The extent of the immunity of some IOs is unclear in both their constitutions and subsequent agreements among their members. Determination of immunity of these organizations has been greatly influenced by policies of "restrictive" immunity developed in the past decade as a result of the modification of the notion of foreign "sovereign immunity" in general. This modification is due to the increasing involvement of sovereign States, and to a lesser degree of IOs, in commercial activities. Courts now seem to distinguish between acts relating to the "principal" functions and to the "private" nature of IOs. The courts tend to extend their jurisdiction over acts of a "private" or "commercial" nature, but generally refuse to adjudicate claims in relation to "public" law activities of those organizations.¹³²

The practice in the U.S. and in Italy, where the absolute immunity of

128. Accordingly, section 10 of the U.S. Bretton Woods Agreements Act of 1945 provides that any action brought within the United States by or against the I.M.F. or the I.B.R.D. "shall be deemed to arise under the laws of the United States." 22 U.S.C. § 286(g) (1976). This seems to refer to the competence of U.S. courts to entertain the action, rather than to prescribe the applicable law.

Philippine law relating to the I.M.F. and the I.B.R.D., which is modelled on U.S. law, provides for competence of national courts. Act of Nov. 20, 1945, Commonwealth Act No. 699, § 10, 41 Official Gazette of the Philippine Islands 761, 764 (1945).

129. *Lutcher S.A. Cellulose e Papel v. Inter-American Development Bank*, 382 F.2d 454 (D.C. Cir. 1967).

130. International Organizations Immunities Act, 22 U.S.C. § 288a(b) (1976).

131. Agreement Establishing Inter-American Development Bank, Apr. 8, 1959, art. XI, § 3, 10 U.S.T. 3029, T.I.A.S. No. 4397, 389 U.N.T.S. 69.

132. Although immunity in relation to "sovereign States" has been discussed extensively by jurists, and a rich body of literature and case law has developed, scholars have not related

IOs has been challenged, is instructive. In the U.S., in addition to the Charter, the Headquarters Agreement, and the Convention on Privileges and Immunities, which are specifically related to the U.N., the I.O.I.A. provides:

International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.¹³³

The I.O.I.A., which is applicable to all "international organizations," defines an international organization and authorizes the President to designate which organizations shall enjoy such immunity.¹³⁴ The re-examination of IO immunity in U.S. courts has been conducted strictly within the framework of the I.O.I.A., the Foreign Sovereign Immunities Act of 1976,¹³⁵ and the constitutions of other IOs. Recent cases have not construed the U.N. Charter, the Convention on Privileges and Immunities, or the Headquarters Agreement. Some language, which has been construed, however, is similar in all these agreements.¹³⁶

The extent of O.A.S. immunity from suit in U.S. courts remains unclear. Under its Charter, the O.A.S. enjoys *necessary* immunity for the exercise of its functions.¹³⁷ It has been recognized as a public international organization for purposes of the I.O.I.A. In *Dupree Associates v. Organization of American States*,¹³⁸ the plaintiff, a private contractor, brought suit for breach of contract against the O.A.S. and its Secretary-General in the U.S. District Court for the District of Columbia. Claiming that in 1954 President Eisenhower designated the O.A.S. as a "pub-

the concept to IOs, nor have many court decisions contributed to the clarification of this legal issue. See C. JENKS, *supra* note 68.

133. 22 U.S.C. § 288a(b) (1976).

134. Under the International Organizations Immunities Act, the term 'international organization' means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter.

22 U.S.C. § 288a(b) (1976).

135. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1, 1330, 1332, 1391, 1441, 1602-1611 (1976).

136. Compare the language in U.N. CHARTER arts. 104, 105 with the principles of the Convention on Privileges and Immunities of the United Nations, *supra* note 69; Charter of the Organization of American States, Additional Protocol, *supra* note 29, art. 139; Agreement on Privileges and Immunities of O.A.S., Pan-Am. T.S. No. 22 (1950), [1950] 2 O.A.S. ANN. 29-30.

137. Charter of the Organization of American States, *supra* note 29, art. 103.

138. *Dupree Assoc. v. O.A.S.*, No. 76-2335 (D.D.C., June 1 and June 22, 1977) (memorandum orders).

lic international organization" within the meaning of the I.O.I.A., defendants moved to dismiss the claim on grounds of immunity from suit. The immunity, they claimed, was later extended to the Permanent Observers to the O.A.S. and to the members of their diplomatic staff¹³⁹ as well as to the representatives and advisers of Member States. Furthermore, the O.A.S. claimed that Article 139 of the O.A.S. Charter provides that the Organization "shall enjoy in the territory of each member such . . . immunities as are necessary for the exercise of its functions and the accomplishment of its purposes."¹⁴⁰ In rejecting the O.A.S. argument, the court held that Congress stated expressly in the I.O.I.A. that "international organizations . . . shall enjoy the *same immunity from suits* . . . as is enjoyed by *foreign governments*"¹⁴¹ and that, since 1952, the State Department has used a "restrictive" concept of immunity with respect to foreign sovereigns by distinguishing between "public" or "governmental" acts and "commercial" acts. The court noted that the impact of the State Department's policy on jurisdictional immunity was dealt with in *Victory Transport Inc. v. Comisaria General*,¹⁴² in which the Second Circuit recognized that the *restrictive* concept of immunity was the governing principle with respect to immunity for foreign sovereigns. The D.C. court reasoned that, because foreign sovereigns are only entitled to restrictive immunity, and IOs under the I.O.I.A. are extended only that immunity enjoyed by foreign sovereigns, it follows that IOs are entitled only to "restricted" immunity. The district court concluded that the Second Circuit's reasoning was the proper interpretation. Because the State Department had refrained from urging that defendants be granted immunity, the O.A.S. motion to dismiss the claim was denied.

U.S. courts have refused jurisdiction, however, over claims related to "public" functions of IOs. In 1977, an ex-staff member, who had been dismissed, brought suit against the International Telecommunications Satellite Organization (Intelsat) in relation to the workmen's compensation regime.¹⁴³ The District of Columbia Court of Appeals upheld a trial court order dismissing the claim on the ground of the defendant's immunity under the I.O.I.A.

139. Defendants cited Exec. Order No. 11931, 41 Fed. Reg. 32689 (1976), *reprinted in* 22 U.S.C. § 288g, at 293 (1976).

140. Charter of the Organization of American States, Additional Protocol, *supra* note 29, art. 139.

141. *Dupree Assoc. v. O.A.S.*, No. 76-2335 (D.D.C., June 1 and June 22, 1977) (memorandum orders).

142. *Victory Transport Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

143. *Weidner v. Intelsat*, 392 A.2d 508 (D.C. 1978) (*per curiam*).

In a more recent case, *Broadbent v. Organization of American States*,¹⁴⁴ the plaintiffs, dissatisfied with the decision of the O.A.S. Administrative Tribunal concerning compensation for their dismissal from the O.A.S., brought suit against the Organization in the U.S. District Court for the District of Columbia, alleging breach of contract. The court initially rejected a motion to dismiss the complaint on grounds of immunity. The O.A.S. then filed a request for certification for an interlocutory appeal of the order of the court. The U.N., W.H.O., I.B.R.D., the Inter-American Defense Board, and the Inter-American Development Bank filed memoranda as amici curiae in support of the request for certification. In a final order of March 28, 1978, the district court vacated its earlier order and dismissed the suit on the grounds

that international organizations are immune from every form of legal process except insofar as that immunity is expressly waived by a treaty or expressly limited by a statute. The Court is further persuaded that this Court has jurisdiction over lawsuits involving international organizations only insofar as such jurisdiction is expressly provided for by statute.¹⁴⁵

On appeal,¹⁴⁶ the U.S. Court of Appeals for the District of Columbia refused to decide the question of jurisdiction or whether "restrictive" or "absolute" immunity applied to IOs. The court correctly observed that the employment by IOs of internal administrative personnel is not properly characterized as "doing business." The court supported this view with a passage in the legislative history of the Foreign Sovereign Immunities Act.¹⁴⁷ The court concluded that employment of civil servants is a non-commercial activity for purposes of restrictive immunity. The exception for the employment of American citizens, the court explained, is not applicable to IOs, for their civil servants are inevitably drawn either from American or "third country" nationals. Therefore, "[i]n the case of international organizations, such an exception would swallow up the rule of immunity for civil service employment disputes."¹⁴⁸ The court clearly recognized that the denial of immunity to IOs in employment contract disputes would open the door to interfer-

144. *Broadbent v. O.A.S.*, 481 F. Supp. 907 (D.D.C. 1978), *aff'd*, 628 F.2d 27 (D.C. Cir. 1980).

145. 481 F. Supp. at 908.

146. *Broadbent v. O.A.S.*, 628 F.2d 27 (D.C. Cir. 1980).

147. 628 F.2d at 34. The passage from the House Report on the bill reads: "Also public or governmental and not commercial in nature would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States." H. REP. NO. 94-1487, 94th Cong., 2d Sess. 16 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6614.

148. 628 F.2d at 34.

ence by States in the internal affairs of IOs, and consequently would undermine the ability of IOs to function effectively.¹⁴⁹ The court granted immunity to the O.A.S. and dismissed the appeal.

Although there is no clear decision as to whether the immunity of IOs is "absolute" or "restrictive," the trend seems to be toward a "restrictive" immunity. Even in *Broadbent*, where the court refused to decide this issue, its reasoning for granting immunity also would have been sound under a theory of "restrictive" immunity.

The immunity of specialized agencies is a different matter. Specialized agencies are intergovernmental organizations established under Article 57 of the Charter and brought into relationship with the U.N. under Article 63 of the Charter.¹⁵⁰ While specialized agencies are within the U.N. system, they do not necessarily and automatically enjoy the same privileges and immunities as the U.N. A Convention on the Privileges and Immunities of Specialized Agencies, adopted in 1947,¹⁵¹ grants absolute immunity to specialized agencies. So far only 85 States have ratified it.

The constitutions of the specialized agencies make reference to their immunities, but they differ substantially. Some, such as the constitutions of the Food and Agriculture Organization (F.A.O.), the United Nations Educational, Social, and Cultural Organization (UNESCO), and the Inter-governmental Maritime Consultative Organization (I.M.C.O.), provide absolute immunity.¹⁵² The constitutions of most specialized agencies, however, refer to a vague immunity that might not

149. *Id.* at 35.

150. U.N. CHARTER arts. 57, 63.

151. Convention on Privileges and Immunities of Specialized Agencies, Nov. 21, 1947, 33 U.N.T.S. 261.

152. "Each Member Nation undertakes, insofar as it may be possible under its constitutional procedure, to accord to the Organization all the immunities and facilities which it accords to diplomatic missions, including inviolability of premises and archives, immunity from suit and exemption from taxation." Constitution of the Food and Agriculture Organization, Oct. 16, 1945, art. XVI, § 2, 12 U.S.T. 980, T.I.A.S. No. 4803; UNICEF Constitution, *done* Nov. 16, 1945, art. XII, 61 Stat. 2495, T.I.A.S. No. 1580, 4 U.N.T.S. 275; Convention on the Inter-governmental Maritime Consultative Organization, Mar. 6, 1948, art. 50, 9 U.S.T. 621, T.I.A.S. No. 4044, 289 U.N.T.S. 48. Article XII of the UNESCO Constitution provides for the same privileges and immunities as do articles 104 and 105 of the U.N. Charter, and article 50 of the I.M.C.O. Constitution refers to the Convention on the Privileges and Immunities of Specialized Agencies. It must be noted, however, that not all States are members of specialized agencies.

See also Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, art. IX, § 3, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39 (immunity from judicial process except to extent expressly waived).

For a brief history of the constitutional provisions on privileges and immunities of specialized agencies, see D. MICHAELS, PRIVILEGES AND IMMUNITIES OF THE INTERNATIONAL CIVIL SERVANTS OF SELECTED INTERNATIONAL ORGANIZATIONS 111-23 (1970).

be interpreted as absolute. For example, the constitutions of the W.H.O., the International Atomic Energy Agency (I.A.E.A.), and the World Intellectual Property Organization (W.I.P.O.)¹⁵³ provide that, in the territories of their members, their respective agencies shall enjoy such privileges and immunities as may be necessary for the fulfillment of their functions. In the constitutions of other specialized agencies, limited immunity is clearly stated. For example, the constitutions of I.B.R.D., the International Development Association (I.D.A.), and the International Finance Corporation (I.F.C.) provide that their immunity is limited to actions brought by member States or by persons acting for or deriving claims from them.¹⁵⁴ The headquarters agreements of the specialized agencies provide that they are immune from every form of legal process unless they expressly waive their immunities.¹⁵⁵ Such pro-

153. Constitution of the World Health Organization, *opened for signature* July 22, 1946, Chap. XV, 62 Stat. 2679, T.I.A.S. No. 1808, 14 U.N.T.S. 185; Statute of the International Atomic Energy Agency, *done* Oct. 26, 1956, art. XV, 8 U.S.T. 1093, T.I.A.S. No. 3873, 276 U.N.T.S. 3; Convention Establishing the World Intellectual Property Organization, July 14, 1967, art. 12, 21 U.S.T. 1749, T.I.A.S. No. 6932, 828 U.N.T.S. 3.

154. Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, art. VII, § 3, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 39; Articles of Agreement of the International Development Association, *approved* Jan. 26, 1960, art. VIII, § 3, 11 U.S.T. 2284, T.I.A.S. No. 4607, 439 U.N.T.S. 249; Articles of Agreement of the International Finance Corporation, *opened for signature* May 25, 1955, art. VI, § 3, 7 U.S.T. 2197, T.I.A.S. No. 3620, 264 U.N.T.S. 117.

See also Convention on Privileges and Immunities of Specialized Agencies, *approved* Nov. 21, 1947, Annex VI, 33 U.N.T.S. 261 (relating to the I.B.R.D.); Constitution of the International Labour Organisation, *adopted* Oct. 9, 1946, 62 Stat. 3485, T.I.A.S. No. 1868, 15 U.N.T.S. 35 (similar provisions).

The constitution of the International Fund for Agricultural Development refers to the privileges and immunities necessary to the organization's independent exercise of its functions. The extent of those privileges and immunities is specified in art. 10, § 2(b)-(c) of the constitution as follows:

(b)(i) In the territory of any Member that has acceded to the Convention on Privileges and Immunities of the Specialized Agencies in respect of the Fund, . . . as defined in the standard clauses of that Convention as modified by an annex thereto approved by the Governing Council;

(ii) In the territory of any Member that has acceded to the Convention on Privileges and Immunities of the Specialized Agencies only in respect of agencies other than the Fund, . . . as defined in the standard clauses of that Convention, except if such Member notifies the Depositary that such clauses shall not apply to the fund or shall apply subject to such modifications as may be specified in the notification;

(iii) . . . as defined in other agreements entered into by the Fund.

(c) In respect of a Member that is a grouping of States, it shall ensure that the privileges and immunities referred to in this Article are applied in the territories of all members of the grouping.

Agreement Establishing the International Fund for Agricultural Development, *adopted* June 13, 1976, art. 10, § 2(b)-(c), U.N. Doc. A/CONF.73/15 (1976).

155. W.H.O. Headquarters Agreement, *entered into force* July 17, 1948, art. 6, § 1, 26 U.N.T.S. 331; UNESCO Headquarters Agreement, July 2, 1954, art. 12, 357 U.N.T.S. 3; F.A.O. Headquarters Agreement, Oct. 31, 1950, art. VIII, § 16, *reprinted in* *Gazetta Ufficiale* (Jan. 27, 1951); I.A.E.A. Headquarters Agreement, Dec. 11, 1957, art. VIII, § 20, 339 U.N.T.S. 111.

visions partially immunize the agencies from legal process only in the local courts of the headquarters sites, and not in the courts of other States.

Considering the limited number of States that have ratified the Convention on the Privileges and Immunities of Specialized Agencies, the vague provisions on immunity in the constitutions of specialized agencies, and the fact that not all States are members of the specialized agencies, it would appear that these agencies could well be sued in local courts. So far, no significant lawsuits have been brought against them. States have generally respected the immunity of these organizations from all legal process.¹⁵⁶ As the Permanent Court of International Justice (P.C.I.J.) and the I.C.J. have repeatedly declared,¹⁵⁷ however, the mere practice of abstention—not bringing suits against specialized agencies—without consideration of conditioning factors, is insufficient proof of the existence of an international legal custom requiring abstention. Abstention may be based on ambiguous reasons unrelated to the legal nature of a particular incident and consequently devoid of any legal requirement. Hence, a contextual examination is critical for interpretation of the following example.

In 1969, an employment claim against the F.A.O. was brought in a court of first instance in Rome by a former F.A.O. employee of Italian nationality. The court dismissed the case for lack of jurisdiction.¹⁵⁸ With regard to immunity it argued that “immunity could only be recognized with regard to public law activities, i.e., in the *case of an international organization with regard to activities by which it pursues its specific purpose (iure imperii)* but not with regard to private law activities where the Organization acts on an equal footing with individuals (*uti privatus*).”¹⁵⁹ In interpreting Article VIII of the F.A.O. Headquarters Agreement, the court noted that the provision merely confirmed the general rules of customary international law, but could not be understood as granting absolute immunity.

156. See *Relations Between States and Inter-Governmental Organizations*, *supra* note 112, at 302-03.

157. See *The S.S. Lotus*, [1927] P.C.I.J., ser. A, No. 10, at 28; *Asylum Case*, [1950] I.C.J. 266, 286; *North Sea Continental Shelf Cases*, [1969] I.C.J. 3, 44. *But cf.* *Nottebohm Case*, [1955] I.C.J. 4, 21-22 (Court relied on State restraint as evidence of existence of international norm restricting freedom of action).

158. *Giovanni Porru v. Food and Agricultural Organization*, Judgment of June 25, 1969, Rome Court of First Instance (Labor Section), *summarized in* 1969 U.N. JURIDICAL Y.B. 238. The court stated that “the acts by which an international organization arranges its internal structure fall *undoubtedly* in the category of acts performed in the exercise of its established function and that in this respect therefore the Organization enjoys immunity from jurisdiction.” *Id.*

159. *Id.* (emphasis added).

The above cases indicate a new trend in which national courts may assume jurisdiction over claims in relation to activities unrelated to the internal structure or the principal function of IOs. The U.N. and its organs still enjoy absolute immunities in accordance with the Charter and the Convention on Privileges and Immunities. The specialized agencies, however, do not seem to enjoy such extensive immunities in all countries and may well become targets in local courts for "private" lawsuits.

E. *International Court of Justice*

Article 34(1) of the Statute of the Court limits access to the I.C.J. to States. The U.N. and its authorized organs and agencies under Article 96 of the Charter¹⁶⁰ may request advisory opinions. Therefore, the I.C.J. is not open directly to claimants against IOs. Even States which may have claims against the U.N. have no direct access to the I.C.J. They must have the General Assembly or the Security Council request an advisory opinion. Section 30 of the Convention on Privileges and Immunities,¹⁶¹ which is repeated in a number of agreements between States and the U.N., provides that all differences between the States and the U.N. with regard to the interpretation of the Convention should be referred to the I.C.J. unless the parties choose another method of settlement. Accordingly, "a request shall be made for an advisory opinion on any legal questions involved in accordance with Article 96 of the Charter."¹⁶² Article 96 of the Charter provides that the General Assembly or the Security Council may request the I.C.J. to give an advisory opinion on any legal question. Paragraph 2 of Article 96 also provides that "[o]ther organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the court on legal questions arising within the scope of their activities."¹⁶³ The General Assembly has authorized most specialized agencies and some U.N. organs to request advisory opinions at any time, without requiring special authorization for each individual case.¹⁶⁴

160. U.N. CHARTER art. 96.

161. Convention on Privileges and Immunities of the United Nations, *supra* note 69, § 30.

162. *Id.*

163. U.N. CHARTER art. 96, para. 2.

164. See S. ROSENNE, 2 THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 675-90 (1965).

F. *Administrative Tribunals*

The responsibility of IOs towards their own employees has been recognized from the beginning. The first assembly of the League of Nations adopted a recommendation to the effect that, in the case of dismissal, all members of the Secretariat and the International Labour Organisation (I.L.O.) appointed for a period of five years or more would have the right to appeal to the League of Nations or to the Council of the Governing Body of the I.L.O.¹⁶⁵ In 1927 the Assembly established an administrative tribunal that, by its Statute, was competent to hear and decide any dispute between officials and the Secretariat of the League of the I.L.O. concerning compensation payable to the employees under the Staff Regulations.¹⁶⁶

After the establishment of the U.N., an appeals board was set up in 1947 to advise the Secretary-General, with whom the final decision rested, with respect to appeals by staff members.¹⁶⁷ Later, in December, 1949, by Resolution 351 (IV),¹⁶⁸ the General Assembly established an administrative tribunal to hear and pass judgment on cases of non-observance of employment contracts and terms of appointment. When, in 1953, the Tribunal rendered certain judgments ordering the Secretary-General to pay a large indemnity to officials whose appointment had been terminated, the question was raised in the Assembly whether the latter had the right to refuse the order and, if so, on what grounds. General Assembly Resolution 785 (VIII)¹⁶⁹ submitted these questions to the I.C.J. for an advisory opinion. In emphasizing the obligation of the Secretary-General to obey the Tribunal's judgments, the Court opined that, in signing a contract, the Secretary-General, as the Chief Administrator, "engages the legal responsibility of the Organization, which is the judicial person on whose behalf he acts."¹⁷⁰

Presently most major IOs have administrative tribunals. Access is limited to staff and competence is limited to matters of staff contractual rights and terms of appointment. Only the Statute of the I.L.O. Administrative Tribunal provides in Article II(4) that it has competence over "disputes arising out of a contract to which the I.L.O. is a party

165. See League of Nations, First Assembly (1920), plenary mtg., at 663-64.

166. M. HUDSON, *INTERNATIONAL TRIBUNALS: PAST AND FUTURE* 220-22 (1944). See also RANSHOFEN-WERTHEIMER, *THE INTERNATIONAL SECRETARIAT* 259-62 (1945).

167. Annual Report of the Secretary-General on the Work of the Organization, 2 U.N. GAOR, Supp. (No. 1) 1, 77, U.N. Doc. A/315 (1947).

168. G.A. Res. 351, U.N. Doc. A/1127, at 170 (1949).

169. G.A. Res. 785, 8 U.N. GAOR, Supp. (No. 17) 41, U.N. Doc. A/2630 (1953).

170. Advisory Opinion on Effects of Awards of Compensation Made by the United Nations Administrative Tribunal, [1954] I.C.J. 47, 53.

and which provides for the competence of the Tribunal.”¹⁷¹ The intention that the I.L.O. Administrative Tribunal replace arbitral tribunals in contracts with outside parties was never implemented. Some IOs do not have administrative tribunals. Staff claims against such organizations are judged by and appealed to higher-ranking members of those organizations.

Conclusion: Principles of Law and Guiding Policies

This cursory review of decisional trends indicates that the growth in the number of international claims has not been matched by a comparable development in theory or in the articulation of general policies to guide decision. The lag should be a cause for concern. Increases in IO activity can only lead to more claim-related problems. The absence of an appropriate theory may lead to uncoordinated decisions and an inconsistent body of case law. Fortunately, international and comparative jurisprudence does provide a rich body of principles and policies that could be adapted to the legal issues raised in claims involving IOs.

A. *Principles of Remedy and Organizational Efficiency*

A corollary of the principle of responsibility is the principle of remedy. The point, which would appear to be self-evident, often is overlooked, in large part because of enforcement problems. Remedies may take the form of monetary awards for compensation, punitive damages, or special awards. Analogies from private law to the public sector must be drawn with caution. There are significant differences in both scale and public policy when one moves from States or individuals to IO defendants. Furthermore, the principle of organizational efficiency dictates that the appropriate responsibilities and remedies for IOs should not disturb their efficient functioning. This is not a blanket exoneration, nor a minimization of responsibility for unlawful behavior. It follows from the role of IOs as representatives of the shared interests of the larger community and from the tendency of IOs to operate in unusual circumstances where appropriate norms may not be clear.

B. *Principle of Due Process*

The discharge of the above principles must be accomplished with appropriate procedures. We call this the principle of “due process,” a term drawn from national legal systems and expressed in many equivalent situations as “general principles of law.” It requires analo-

171. I.L.O. STAT. art. II, § 4.

gous meaning in international jurisprudence. A fundamental set of principles for the protection of human rights is provided in the Universal Declaration of Human Rights.¹⁷² The General Assembly and many U.N.-affiliated organizations have adopted recommendations to promote the Declaration, and much of its content has been embodied in multilateral agreements.¹⁷³ It is hardly radical to contend that the U.N., through which the Declaration came about, must, in its own activities and procedures, comply with these principles to the greatest possible extent.

Article 10 of the Declaration provides that every person is entitled to a hearing by a tribunal in the determination of his rights and obligations.¹⁷⁴ Similarly, Section 29 of the Convention on Privileges and Immunities provides that the U.N. "shall make provisions for appropriate modes of settlement."¹⁷⁵ The most appropriate mode of settlement for the U.N. is arbitration if claims cannot be settled through negotiation. In most cases, this policy has been followed by the U.N.

Claims commissions would be appropriate for a quick and fair settlement of claims arising out of special operations such as peace-keeping. They are not handicapped by complex and lengthy legal procedures, and the predominant principles are common sense and fairness. Unfortunately, such commissions were not used for Congolese claims, most of which remain unsettled. Prospectively, they would appear preferable to other modes of dispute settlement for the planned U.N.

172. G.A. Res. 217, U.N. Doc. A/777, at 535 (1948). Promotion of the shared interests of the larger community through IOs must never be jeopardized, but it would be quite ironic to negate the rights of individuals on the assumption that they might be incompatible with the functions of IOs.

173. See, e.g., International Covenant on Civil and Political Rights and Optional Protocol, G.A. Res. 2200(A), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966); International Convention on Elimination of All Forms of Racial Discrimination, *opened for signature*, Mar. 7, 1966, 660 U.N.T.S. 195; Convention on Prevention and Punishment of Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277; International Convention on Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, 28 U.N. GAOR, Supp. (No. 30) 75, U.N. Doc. A/9030 (1973); Supplementary Convention on Abolition of Slavery, *done* Sept. 7, 1956, 18 U.S.T. 3201, T.I.A.S. No. 6418, 266 U.N.T.S. 3; Convention on Nationality of Married Women, *done* Feb. 20, 1957, 309 U.N.T.S. 67; Convention Relating to Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267; Convention on Political Rights of Women, *done* Mar. 31, 1951, 27 U.S.T. 1909, T.I.A.S. No. 8289, 193 U.N.T.S. 135; Discrimination (Employment and Occupation) Convention, *adopted* June 25, 1958, 362 U.N.T.S. 31; Convention against Discrimination in Education, *adopted* Dec. 14, 1960, 429 U.N.T.S. 93; Equal Remuneration Convention, *adopted* June 29, 1951, 165 U.N.T.S. 304; Abolition of Forced Labor Convention, *adopted* June 25, 1957, 320 U.N.T.S. 292.

174. G.A. Res. 217, U.N. Doc. A/777, at 535 (1948).

175. Convention on Privileges and Immunities of the United Nations, *supra* note 69, § 29.

operation in Namibia, which will involve at least one thousand civilians and a peace-keeping force of several thousand troops.

C. *International Defenses and the Principle of International Burden of Proof*

IOs should be able to plead certain defenses available to States. Certainly, in peace-keeping operations, U.N. forces could be attacked and the actions necessary for self-defense might cause injuries. Hostilities waged for collective enforcement of international law through the U.N. cannot be strictly described as "war." Yet in the U.N. operation in the Congo, the term "laws of war" frequently appeared to have been used to justify not paying some damages. Whether or not "laws of war" was correctly used, it is clear that the U.N. would claim, as a defense, a right under the laws of war akin to that available to States. That defense would require a demonstration that there was a reasonable proportionality between the actions taken and the danger posed, and that the injury claimed was proximately caused by the lawful act of self-defense.¹⁷⁶ The U.N. would have to provide evidence as to the grave necessity of its actions if it hoped to deny liability. The burden of proof would be on the organization. This allocation of burden of proof as to liability is generally appropriate in disputes between private parties and IOs with extensive immunities because the organizations may refuse to waive their immunities and may have unilateral competence to make final judgments about their own liability, although pre-existing and generally accepted rules for examining their behavior may be unclear.

176. The Hague Convention of 1907 and the Geneva Convention on Protection of Civilian Persons in Time of War, with its additional protocols of June, 1977, deal with interference with property rights and compensation during war. The Hague Convention provides that a belligerent party which violates the regulations annexed to the convention shall, if the case demands, be liable to pay compensation and shall be responsible for all acts committed by persons forming part of its armed forces. Hague Convention for the Pacific Settlement of Disputes, Oct. 18, 1907, art. 3, 36 Stat. 2199, T.S. No. 536. The convention outlaws action "to destroy or seize the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war." *Id.*, art. 23.

Article 33 of the Geneva Convention on Protection of Civilian Persons in Time of War prohibits pillage and "reprisals against protected persons and their property," and article 53 provides: "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." Convention on Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 33, 53, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.